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THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

April 15, 1999

Mr. Moulton S. Dowler, Jr.
Gresham, Davis, Gregory, Worthy & Moore
112 E. Pecan Street, Suite 900
San Antonio, TX 78205-1542

Mr. James A. Vaught
Law Offices of Edwin J. (Ted) Terry, Jr.
805 West 10th Street, Suite 300
Austin, TX 78701

Mr. James L. Drought
Drought, Drought & Bobbitt
112 East Pecan Street, Suite 2600
San Antonio, TX 78205

RE: Case Number 98-1041
Court of Appeals Number: 04-97-00933-CV
Trial Court Number: 17,780

Style: ROBERT QUALIA
v.
THOMAS M. QUALIA and JOHN QUALIA

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above styled petition for review.

Motion to publish court of appeals' opinion relevant to motion for rehearing is overruled.

Sincerely,

John T. Adams, Clerk

by /s/ Blanca E. Morin
Deputy

Blanca E. Morin,

cc: Mr. Herb Schaefer, Clerk
Ms. Martha Germany

THE SUPREME COURT OF TEXAS

Orders Pronounced February 18, 1999

ORDERS ON PETITIONS FOR REVIEW

THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

98-0910 CLARENCE M. HINES v. LORINE WARD HINES; from Smith County; 12th district (12-97-00435-CV, RULE 47.7, 05-28-98)

98-1041 ROBERT QUALIA v. THOMAS M. QUALIA and JOHN QUALIA; from Val Verde County; 4th district (04-97-00933-CV, RULE 47.7, 08-05-98)

98-1230 YSIDRO SEGOVIA v. TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES; from Harris County; 14th district (14-97-01363-CV, 979 SW2D 785, 10-29-98)

98-1256 LORI MCGUINNESS and THOMAS MCGUINNESS v. STATE FARM FIRE & CASUALTY CO. and STATE FARM LLOYDS; from Harris County; 1st district (01-98-00071-CV, RULE 47.7, 11-05-98)

99-0013 REBECCA A. PENINGER v. NEIMAN MARCUS, INC. d/b/a NEIMAN MARCUS GROUP, INC., RANDY WOOD, JULIE ALEXANDER; from Tarrant County; 2nd district (02-98-00022-CV, RULE 47.7, 11-19-98)

99-0028 THE GROCERS SUPPLY COMPANY, INC. v. JOHN

SHARP, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, DAN MORALES, ATTORNEY GENERAL OF THE STATE OF TEXAS; from Travis County; 3rd district (03-97-00749-CV, 978 SW2D 638, 08-13-98)

ORDERS ON MOTIONS

THE FOLLOWING MOTIONS FOR REHEARING OF PETITIONS FOR REVIEW ARE OVERRULED:

98-0908 WAL-MART STORES INC. v. RUBY McEWEN; from Bexar County; 4th district (04-96-00896-CV, 975 SW2D 25, 02-27-98)

98-1099 VICTORIA MALCOLM, TED DAHL, Individually and as trustee for the VICTORIA KOCI MALCOLM ESTATE TRUST, and SPRING LAKE WILDLIFE PRESERVE v. SPRING LAKE ASSOCIATES LIMITED PARTNERSHIP, SPRING LAKE LAKEHOMES HOMEOWNERS ASSOCIATION INC., SPRING LAKE HOMES L.L.C., HOUSTON VOA ELDERLY HOUSING INC., and SPRING LAKE INC. n/k/a HOLLISTER SPRING LAKE INC.; from Harris County; 1st district (01-97-00378-CV, RULE 47.7, 08-20-98)

THE FOLLOWING MOTION FOR REHEARING OF A PETITION FOR WRIT OF MANDAMUS IS OVERRULED:

98-1154 IN RE JOHNNY DWAYNE STATEN

MISCELLANEOUS

THE FOLLOWING PETITION FOR WRIT OF MANDAMUS IS ABATED:

99-0128 IN RE ZAMBALA CORPORATION

motion for emergency temporary relief overruled

With the following notation: "The petition for writ of mandamus is abated to allow the relator to seek relief from the successor judge. *See Lunsford v. Morris*, 746 S.W.2d 471, 471 n.1 (Tex. 1988); TEX.R.APP.P. 7.2(b)."

(Order delivered February 12, 1999)

THE MOTION FOR EMERGENCY RELIEF, OR ALTERNATIVELY MOTION FOR STAY, IS OVERRULED IN THE FOLLOWING CASE PENDING ON PETITION FOR WRIT OF PROHIBITION:

99-0046 IN RE XAVIER CANTU

[NOTE:The petition for writ of prohibition remains pending before this Court.]

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
300 DOLOROSA, SUITE 3200
BEXAR COUNTY CRIMINAL JUSTICE CENTER
SAN ANTONIO, TEXAS 78205-3037
HERB SCHAEFER, CLERK

September 16, 1998

Moulton S. Dowler, Jr.
GRESHAM, DAVIS, GREGORY,
WORTHY & MOORE, P.C.
112 East Pecan Street,
Suite 900
San Antonio, TX 78205

Samuel H. Bayless
GRESHAM, DAVIS, GREGORY,
WORTHY & MOORE, P.C.
112 East Pecan Street,
Suite 900
San Antonio, TX 78205

A. W. Worthy
GRESHAM, DAVIS, GREGORY,
& MOORE, P.C.
112 East Pecan Street,
Suite 900
San Antonio, TX 78205

James L. Drought
DROUGHT & PIPKIN, L.L.P.
112 East Pecan Street,
Suite 2600
San Antonio, TX 78205

Patricia J. Schofield
DROUGHT & PIPKIN, L.L.P.
112 East Pecan Street, Suite 2600
San Antonio, TX 78205

RE: Court of Appeals Number: 04-97-00933-CV
Trial Court Case Number: 17,780

Style: Robert Qualia, (APPELLANT/APPELLEE)
v.
Thomas M. Qualia and John Qualia,
(APPELLEES/APPELLANTS)

Dear Counsel:

The Appellant's Motion for Rehearing EN BANC in the above styled and numbered cause has this date been DENIED.

Very truly yours,

HERB SCHAEFER, CLERK

/s/ Joyce Wiatrek
JOYCE WIATREK, DEPUTY CLERK

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
300 DOLOROSA, SUITE 3200
BEXAR COUNTY CRIMINAL JUSTICE CENTER
SAN ANTONIO, TEXAS 78205-3037
HERB SCHAEFER, CLERK

September 16, 1998

Moulton S. Dowler, Jr.
GRESHAM, DAVIS, GREGORY
WORTHY & MOORE, P.C.
112 East Pecan Street, Suite 900
San Antonio, TX 78205

Samuel H. Bayless
GRESHAM, DAVIS, GREGORY,
WORTHY & MOORE, P.C.
112 East Pecan Street, Suite 900
San Antonio, TX 78205

A. W. Worthy
GRESHAM, DAVIS, GREGORY,
WORTHY & MOORE, P.C.
112 East Pecan Street, Suite 900
San Antonio, TX 78205

James L. Drought
DROUGHT & PIPKIN, LLP
112 East Pecan Street, Suite 2600
San Antonio, TX 78205

Patricia J. Schofield
DROUGHT & PIPKIN, L.L.P.
112 East Pecan Street, Suite 2600
San Antonio, TX 78205

RE: Court of Appeals Number: 04-97-00933-CV
Trial Court Case Number: 17,780

Style: Robert Qualia, (APPELLANT/APPELLEE)
v.
Thomas M. Qualia and John Qualia,
(APPELLEES/APPELLANTS)

Dear Counsel:

After examination of the record in the above styled and

numbered cause the Court DENIES Appellant's Motion for Rehearing.

ORDERED the day and year first above written.

Very truly yours,

HERB SCHAEFER, CLERK

/s/ Joyce Wiatrek
JOYCE WIATREK, DEPUTY CLERK

Court of Appeals
Fourth Court of Appeals District of Texas
San Antonio

OPINION

No. 04-97-933-CV

Robert **QUALIA**,
Appellant

v.

Thomas M. **QUALIA** & John **QUALIA**
Appellees

From the 63rd Judicial District Court of Val Verde County, Texas
Trial Court No. 17,780
Honorable R.L. Eschenburg, Judge Presiding

Opinion by: Catherine Stone, Justice

Sitting: Alma L. Lopez, Justice
Catherine Stone, Justice
Sarah B. Duncan, Justice

Delivered and Filed: August 5, 1998

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

FACTS AND PROCEDURAL BACKGROUND

Louis Qualia, the father of the three brothers who are parties to this appeal, conducted a ranching operation in Mexico on land owned by Mexican citizens. Robert Qualia joined in his father's ranching operation and was given a 1/4 interest. Under a written contract between Louis and the Mexican landowners, Robert as to

succeed to Louis' remaining interest in the ranch management rights upon Louis' death. Louis Qualia died in 1981, survived by his wife Kathleen and their five children. Kathleen Qualia died testate in 1984. Robert filed an application to probate Kathleen's will in the County Court of Val Verde County and was appointed independent executor of Kathleen's estate. Robert's inventory of the estate was approved by the court on September 20, 1986, and November 6, 1986. Robert's inventory did not include assets of the ranch in Mexico; however, there were no challenges to the inventory as filed. Final accounting and distribution of the estate was approved on April 25, 1988. Robert was discharged as independent executor on May 12, 1988.

On May 24, 1989, Tom and John Qualia filed suit in the 63rd District Court of Val Verde County against Robert, as an individual and as independent executor of Kathleen Qualia's estate, for conversion, breach of fiduciary duty, negligence, and tortious interference with inheritance rights. Tom and John also sought imposition of a constructive trust on assets located on the ranch in Mexico. Tom and John alleged that Robert mismanaged estate assets by failing to distribute to them their proportionate share of Kathleen's interest in the ranch and ranch assets in Mexico. Robert filed a general denial in answer to the suit filed.

During the discovery process, Tom and John requested "factura" books for the ranch in Mexico, livestock inventories for the ranch, bank statements, and income tax returns for the estate and for Robert individually. Robert did not produce all of the requested information. On August 29, 1991, after a hearing on Tom and John's second motion to compel discovery, the district court entered an order that became the fulcrum of this litigious saga. The district court's order stated as follows:

> 1. The claims made by Plaintiffs in their First Amended Original Petition against ROBERT QUALIA, Individually for conversion be and are hereby severed from those claims made by Plaintiffs against ROBERT QUALIA in his capacity as independent executor of the estate of Kathleen G. Qualia and

such severed claims shall hereafter remain in the 63rd Judicial District Court of Val Verde County, Texas under Cause No. 17,780. All claims against ROBERT QUALIA in his capacity as independent executor of the estate of Kathleen G. Qualia shall be dismissed without prejudice for re-filing within the applicable period of time, in the County Court at Law, Val Verde County, Texas;

2. That the answer of Defendant ROBERT QUALIA Individually, to the claims made by Plaintiffs for conversion more fully described in Plaintiff's First Amended Original Petition filed in Cause No. 17,780 against ROBERT QUALIA, Individually, be and is in all things stricken;

3. That an Interlocutory Default Judgment be entered against ROBERT QUALIA, Individually in the severed case, Cause No. 17,780, on claims of conversion and that damages be awarded to Plaintiffs; the amount of such damages to be determined in a separate proceeding. . .; and

4. That Plaintiffs are hereby awarded and shall recover from ROBERT QUALIA, individually attorney's fees in the amount of $5,000.00.

On October 4, 1991, Tom and John filed suit in Val Verde County Court, against Robert as independent executor **and** as an individual. Tom and John raised all claims, except conversion, previously raised in the district court. The county court granted Robert's motion for summary judgment on these claims on March 10, 1993, and entered a take-nothing judgment on the grounds that the action was an improper collateral attack on the final orders of the court and was barred by expiration of the statute of limitations. Tom and John did not appeal the entry of this summary judgment.

In the meantime, Robert filed a writ of mandamus in this court seeking to overturn the district court's discovery sanction order entered August 29, 1991. On July 8, 1992, this court denied the writ after

reviewing the propriety of striking Robert's answer and entering default judgment on the conversion claim as a discovery sanction under *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991). When the case returned to the district court, Tom and John filed a Second Amended Original Petition; however, the petition still named Robert as a party in his individual capacity as well as independent executor of Kathleen's estate and raised the claims of breach of fiduciary duty and negligence in management of the estate assets. On May 12, 1993, Robert filed a motion for summary judgment raising the issues of lack of jurisdiction, res judicata, collateral estoppel, and improper collateral attack. The district court granted summary judgment, finding that it lacked jurisdiction. Tom and John appealed to this court. On June 15, 1994, this court reversed and remanded the district court's grant of the motion for summary judgment, holding that the district court did have jurisdiction to hear the matter.

Upon remand, Robert was granted leave to file an amended answer raising the affirmative defenses of res judicata, collateral estoppel, improper collateral attack, and statute of limitations; however, the district court ordered that the filing of such amended answer did not set aside the default judgment entered against Robert on August 29, 1991. The case proceeded to trial on January 27, 1997, against Robert in his individual capacity **and** as independent executor on the claims of conversion, breach of fiduciary duty, and negligence in the management of estate assets. On the date of trial, Tom and John filed a Second Amended Original Petition against Robert in his individual capacity and as independent executor. Robert filed an amended answer, again asserting affirmative defenses. Robert also filed a motion to strike all claims against him as independent executor and a motion to strike all claims against him individually, except conversion. The district court denied Robert's motions. The case was tried on the three claims against Robert as an individual and as independent executor.

The jury entered a verdict in favor of Tom and John on all three of the claims submitted: conversion, breach of fiduciary duty, and negligence. On the conversion claim, the jury awarded each $183,000 damages and $100,000 exemplary damages. On the breach of fiduciary

duty claim, the jury awarded each $100,000 damages and $100,000 exemplary damages. On the negligence claim, the jury awarded each $100,000 damages and $100,000 exemplary damages.

On April 1, 1997, following trial, the district court entered an order striking Robert's amended answer and all previous answers filed by him in his individual capacity, holding that the discovery sanctions imposed in the August 29, 1991, order applied to Robert, individually, precluding the filing of such answers, and the default judgment on the conversion claim remained in full force and effect. On August 20, 1997, the district court entered a judgment notwithstanding the verdict (j.n.o.v.) on the breach of fiduciary duty and negligence claims on the ground that the claims were barred under the doctrine of res judicata by the summary judgment entered in the court on March 10, 1993, and by expiration of the statute of limitations. The district court granted judgment on the conversion claim and then assessed damages and exemplary damages. The district court awarded prejudgment interest and imposed a constructive trust on the assets in Mexico.

Robert appeals the district court's judgment on the conversion claim, imposition of a constructive trust, and award of prejudgment interest. Tom and John filed a cross-appeal challenging the j.n.o.v on the breach of fiduciary duty and negligence claims.

DISCUSSION

Interpretation of the August 29, 1991, order is necessary to address the points of error raised in this appeal. The order entered August 29, 1991, by Judge Thurmond was interpreted differently by successive judges as the case proceeded, leading to conflicting rulings on various motions filed by the parties. After reviewing the order, we hold that it clearly severed the conversion claim against Robert as an individual from all claims against Robert as independent executor. Tom and John's claims against Robert as independent executor were dismissed, and they were directed to file suit on those claims in the Val Verde County Court. However, the order is silent as to its effect on the claims, other than conversion, against Robert as an individual. Because

the order is silent, it could be assumed that these claims were still alive in the district court. Later litigation of these claims in the district court supports this assumption. However, close inspection of The order reveals that the district court entered default judgment on the **only** claim against Robert in his individual capacity, conversion. The remaining claims, breach of fiduciary duty, negligence in management of estate assets, and tortious interference with inheritance rights, are tied to Robert's duties as independent executor of the estate and, therefore, cannot be litigated against Robert solely as an individual. The trial judge's notes included in the record support this construction.

In his summary of the court proceedings and judgment, Judge Thurmond wrote: "After hearing evidence, and argument of attorneys, Defendants answer in individual capacity ordered stricken. Cause of action against defendants as chief Exu-of Kathleen F. Qualia ordered dismissed w/o prejudice to refiling same in Co. Court at Law. Sanction of $5,000 awarded counsel for Plaintiffs against Defendant individually for not making production." Review of the transcript of the hearing on the motion to compel discovery also supports the conclusion that the district court severed the only claim against Robert in his individual capacity, conversion, from the remaining claims against Robert as independent executor.

After careful review of the record, we hold that the district court entered a default judgment on the only claim against Robert as an individual, conversion, and struck his answer to that claim. The district court concluded that it did not have jurisdiction over the claims against Robert as an independent executor, therefore, it dismissed those claims without prejudice to their refiling in the appropriate court. From this perspective, we will address the points of error raised by both parties.

Because many of Robert's points of error are dependent upon the propriety of the district court's entry of the j.n.o.v., and this is challenged in Tom and John's cross-appeal points of error, we will address those cross-appeal points first.

Tom and John's Cross-Appeal Points of Error

Grant of J.N.O.V. on Basis of Res Judicata

Tom and John contend that the district court erred by granting Robert's j.n.o.v. on the basis of res judicata. Tom and John contend that the county court's summary judgment order did not preclude judgment in the district court on the breach of fiduciary duty and negligence claims based on res judicata because the summary judgment was not a judgment on the merits. Tom and John contend the county court did not have jurisdiction to impose a constructive trust, therefore, it did not have jurisdiction over the breach of fiduciary duty and negligence claims. Consequently, Tom and John contend any judgment entered did not have preclusive effect on the action in the district court. Tom and John challenge the district court's entry of the j.n.o.v. on the basis of res judicata arguing that Robert failed to satisfy the first element of res judicata because the summary judgment was not a judgment on the merits and because the county court was not a court of competent jurisdiction.

A court may enter a j.n.o.v. only when a directed verdict would have been proper. TEX. R. CIV. P. 301; *Eubanks v. Winn*, 420 S.W.2d 698, 701 (Tex. 1967). A defendant is entitled to a directed verdict if each theory of recovery as to which the plaintiff raises an issue of fact on the component elements is destroyed by some affirmative defense. *Watts v. St. Mary's Hall, Inc.*, 662 S.W.2d 55, 59 (Tex.App.–San Antonio 1983, writ ref'd n.r.e.). When the moving party relies upon an affirmative defense to establish entitlement to judgment as a matter of law, each element of that defense must be so conclusively established that reasonable minds could not differ as to the truth of its controlling facts. *Id.*

Res judicata forecloses relitigation of claims that have been finally adjudicated, or that arise out of the same subject matter and that could have been litigated in a prior action. *See Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992). Application of res judicata requires proof of the following elements: 1) a prior final judgment on the merits by a court of competent jurisdiction; 2) identity of parties or

those in privity with them; and 3) a second action based on the same claims that were raised or could have been raised in the first action. *See Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996). When a prior judgment is offered in subsequent litigation in which there is identity of parties, issues, and subject matter, such judgment is treated as an absolute bar to retrial of claims pertaining to the same cause of action on the theory that they have merged into the judgment. *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984); *Housing Authority of City of Corpus Christi v. Massey*, 878 S.W.2d 624, 626 (Tex.App.–Corpus Christi 1994, no writ); *Ambrose v. Mack*, 800 S.W.2d 380, 382 (Tex.App.–Corpus Christi 1990, writ denied). When it disposes of all parties and issues to be litigated, a summary judgment is a final judgment on the merits of the case and is entitled to res judicata effect. *See Mower v. Boyer*, 811 S.W.2d 560, 562 (Tex. 1991); *Acker v. Denton Pub. Co.*, 937 S.W.2d 111, 117 (Tex.App.–Fort Worth 1996, no writ).

The summary judgment entered by the county court was a final judgment on the merits of the claims. *See Chase Manhattan Bank, N.A.*, 787 S.W.2d at 52; *Teer*, 664 S.W.2d at 703; *Acker*, 937 S.W.2d at 117. The county court was a court of competent jurisdiction to hear the claims. Although it could not impose a constructive trust, the county court still had jurisdiction to adjudicate the breach of fiduciary duty and negligence claims against Robert as independent executor because those were matters incident to the estate. The district court properly retained the conversion claim, the only claim that supported imposition of a constructive trust, and Tom and John were ultimately granted that relief in the district court.

Tom and John pursued the claims of breach of fiduciary duty and negligence against Robert as independent executor in the Val Verde County Court after the district court severed those claims from the conversion claim against Robert as an individual. The county court entered summary judgment against Tom and John. Although the claims had been previously severed and dismissed by the district court, and following entry of summary judgment on the claims in the county court,

Tom and John pursued the same claims against Robert as an independent executor in the district court.

The district court's entry of j.n.o.v. on the claims of breach of fiduciary duty and negligence was proper because those claims had been previously severed, dismissed, and adjudicated in the proper court, yet were allowed to be tried by jury. The doctrine of res judicata should have barred the relitigation of the claims. However, we hold the doctrine is still applicable in hindsight to bar recovery on the claims. *See Beaumont v. Baytown Cõnstr. Co.*, 829 S.W.2d 256, 258 (Tex.App.–Beaumont 1992, writ denied). Therefore, the district court's entry of j.n.o.v. on the basis of res judicata was proper. Because the district court's grant of j.n.o.v. was proper on the basis of res judicata, we need not address Tom and John's alternate claim that j.n.o.v. was improperly based on expiration of limitations.

Failure to Apply the Discovery Sanction against Robert, as Independent Executor

Tom and John argue the district court erred by failing to apply its previous discovery sanctions to Robert in his capacity as independent executor and, therefore, erred by entering a j.n.o.v. Tom and John contend the only reason Judge Thurmond did not impose sanctions against Robert as independent executor was because Judge Thurmond believed the court lacked jurisdiction to do so. Because this court subsequently determined that the district court had jurisdiction to hear the case, and the case proceeded to trial against Robert in both capacities, Tom and John contend the district court should have applied the discovery sanctions against Robert as independent executor at the time of trial.

Tom and John attempt to challenge surreptiously the district court's August 29, 1991, order assessing discovery sanctions on the basis that the order did not apply to Robert in both capacities. This court has already reviewed the propriety of the district court's discovery sanction. Tom and John should have raised the argument at that time. *See Amstadt*, 919 S.W.2d at 652.

Without reviewing Tom and John's challenge to the discovery-sanction order, we hold that Tom and John's argument that the district court erred by failing to apply the discovery sanction order to Robert in his capacity as independent executor is clearly without merit. The discovery sanction order clearly applies to Robert in his individual capacity, only. The district court did not err by so construing and applying the discovery sanction order.

Robert's Point of Error

Robert raises numerous points of error challenging the district court's entry of default judgment on the conversion claim and its failure to grant his j.n.o.v. on this claim. We will discuss these arguments in logical sequence in light of the disposition of Tom and John's points of error.

Striking General Denial as a Discovery Sanction

Robert argues that the district court erred by striking his original answer to the suit as a discovery sanction in its August 29, 1991, order. This court has already determined the propriety of the district court's striking of Robert's answer and its entry of the default judgment on the conversion claim as a discovery sanction.

Under the "law of the case" doctrine, questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages. *See Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986); *Pitman v. Lightfoot*, 937 S.W.2d 496, 512-13 (Tex.App.–San Antonio 1996, writ denied). A reviewing court does not again pass upon any matter either presented to or directly passed upon or which was effectively disposed of in a former appeal to that court. *J.O. Lockridge General Contractors, Inc. v. Morgan*, 848 S.W.2d 248, 250 (Tex.App.–Dallas 1993, writ denied). The doctrine's intent is to achieve uniformity of decision as well as judicial economy and efficiency. *Hudson*, 711 S.W.2d at 630. The doctrine is based in public policy and is aimed at putting an end to litigation. *Hudson*, 711 S.W.2d at 630; *Pitman*, 937 S.W.2d at 513. The doctrine applies if the

facts in the second trial are substantially the same as in the first trial or so nearly the same that they do not materially affect the legal issues involved in the second trial. *Pitman*, 937 S.W.2d at 513. However, the doctrine of the law of the case will not apply when the decision of the former appeal is clearly erroneous. *Texas Employers' Ins. Ass'n v. Borum*, 834 S.W.2d 395, 398 (Tex.App.–San Antonio 1992, writ denied); *Texas Employers' Ins. Ass'n v. Tobias*, 740 S.W.2d 1, 2 (Tex.App.–San Antonio 1986, writ denied). The application of the doctrine is addressed to the discretion of the reviewing court. *Trevino v. Turcotte*, 564 S.W.2d 682, 687 (Tex. 1978).

This court will apply the "law of the case" doctrine. The facts of the case in this appeal and relative to this issue are the same as those when the issue was previously addressed by this court. Because this issue has already been addressed by this court in a previous appeal and the propriety of the district court's discovery sanction was affirmed without clear error, we will not pass upon the issue again. *See id.*

Subject Matter Jurisdiction of District Court

Robert argues that the district court did not have subject matter jurisdiction over Tom and John's claims because all of the claims relate to matters incident to the estate of Kathleen Qualia and, therefore, should have been litigated in the Val Verde County Court, where the will was probated.

Robert's argument as it relates to the claims of breach of fiduciary duty and negligence is moot because the district court granted Robert's j.n.o.v. on those claims and, as discussed above, we have affirmed such judgment on those claims. In addition, the county court granted Robert summary judgment relief on these claims.

Although this court has already determined that the district court had subject matter jurisdiction over Tom and John's claim for conversion, Robert contends this court should not apply the law of the case doctrine to the previous opinion because it was clearly erroneous. Robert contends this court, in the previous opinion, cited an amended version of Article V, § 8 of the Texas Constitution as basis for its

determination that jurisdiction was proper in the district court because only the district court had statutory authority to grant the relief requested. Robert contends the appropriate version of the Texas Constitution did not authorize concurrent jurisdiction in the district court on matters incident to an estate. Robert argues that the amended Article V, § 8 granted a district court jurisdiction over matters incident to an estate only when another court had not been granted original, exclusive, or appellate jurisdiction. Robert also contends the previous opinion is clearly erroneous because it cited Tex.Prop.Code Ann. § 115.001 as granting authority to a district court to exercise jurisdiction over a trustee of a constructive trust; however, by its own terms, the Property Code does not apply to constructive trusts, the express relief requested.

We hold that the previous opinion of this court is not clearly erroneous. The previous opinion determined that the district court held subject matter jurisdiction to determine the cause of action because the record did not show that another probate proceeding was pending in the county court, because the matter contested was not a matter incident to the estate, and because the county court could not grant the full relief requested, i.e., conversion. This court discussed the constitutional and statutory authority for exclusive jurisdiction of the county court at law in matters incident to an estate and the concurrent jurisdiction of the district court in other matters. Although the district court cited cases interpreting an amended version of the Texas Constitution relative to its discussion of exclusive and concurrent jurisdiction, such authority did not have bearing on the outcome of the decision or the reasons for the court's determination.

The Texas Constitution grants district courts jurisdiction over all matters. TEX. CONST. Art. V, § 8. The Probate Code limits the general jurisdiction of the district court by granting dominant jurisdiction in probate matters to statutory probate courts and county courts at law, unless the Legislature specifically preserves jurisdiction in the district courts. TEX. PROB. CODE ANN. § 5(c). Section 5A(b) grants district courts probate jurisdiction in specific situations by defining matters incident to an estate that a district court may hear.

TEX. PROB. CODE ANN. § 5A(b). The term "incident to an estate" relative to the jurisdiction of the different courts "confines a probate court's jurisdiction to matters in which the controlling issue is the settlement, partition, or distribution of an estate." *Green v. Watson*, 860 S.W.2d 238, 243 (Tex.App.–Austin 1993, no writ). Therefore, an action incident to an estate "is one in which the outcome will have direct bearing on collecting, assimilating, or distributing the decedent's estate." *Id.*

The outcome of the previous opinion on subject matter jurisdiction was dependant upon the determination that the claim was not a matter incident to the estate. While this case involves the issue of conversion by Robert as an independent executor and requests imposition of a constructive trust over assets involved in an estate settlement, it does not involve a matter incident to an estate. The suit for conversion in the district court was against Robert as an individual. The action was a suit for damages and imposition of a constructive trust against Robert as compensation for his actions of conversion while an independent executor. At the time this suit was filed, the probate of Kathleen's will was closed. Therefore, the outcome of the action would not have direct bearing on the collection, assimilation, or distribution of her estate. The outcome, if in favor of Tom and John, would involve the payment of damages by Robert, as an individual, to Tom and John or the placement of a constructive trust over assets of the estate that Tom and John alleged Robert wrongfully converted.

Because this suit does not involve a matter incident to an estate, neither Article V, § 8 of the Texas Constitution, nor the Probate Code sections relative to exclusive and concurrent jurisdiction, come into play. Therefore, Tom and John's argument that the previous opinion was clearly erroneous on the basis that the court cited amended versions of the Constitution and these statutes must fail.

Whether the District Court's Grant of Summary Judgment Set Aside the Discovery Sanction

Robert contends that the district court's entry of an inconsistent final summary judgment disposing of all remaining claims against him vacated, as a matter of law, the district court's previous interlocutory default judgment on the conversion claim.

Robert's argument is without merit. This court reversed the district court's entry of summary judgment. This court's reversal and remand of the district court's summary judgment order nullified the order and reverted the status of the case in the district court as if the order had never been rendered. *See Flowers v. Flowers*, 589 S.W.2d 746, 748 (Tex. Civ. App.–Dallas 1979, no writ). The previous default judgment on the conversion claim entered as a discovery sanction order remained unaffected following this court's reversal of the district court's summary judgment order.

Denial of Filing of Affirmative Defenses on Conversion Claim

Robert argues that the district court's striking of his amended answers raising affirmative defenses, which were filed after entry of the default judgment, violated his constitutional rights. Robert contends that although default judgment was entered on the conversion claim, such a discovery sanction did not prevent him from subsequently raising affirmative defenses to the claim, and the district court was required to consider such affirmative defenses. Robert further contends that he established the asserted affirmative defenses as a matter of law and, therefore, the district court erred by refusing to permit him to file an answer and by failing to grant j.n.o.v. on the conversion claim. Because this court's denial of mandamus in 1992 was related to the striking of Robert's answer and entry of default judgment as a discovery sanction, Robert contends that the denial of the writ did not preclude him from challenging the district court's striking of his subsequent answers raising affirmative defenses.

If a party's answer is stricken as a discovery sanction, a default judgment entered thereafter is postured as a no-answer default judgment. *See Fears v. Mechanical & Indus. Technicians, Inc.*, 654 S.W.2d 524, 528 (Tex.App.–Tyler 1983, writ ref'd n.r.e.). Once a

default judgment is taken, all allegations of fact set out in the plaintiff's petition are deemed admitted except for the amount of unliquidated damages. *Id.*; *Schwartz v. Pinnacle Communications*, 944 S.W.2d 427, 436 (Tex.App.–Houston [14th Dist.] 1997, no writ).

Robert's arguments are without merit. Robert's liability on the conversion claim was prescribed by the striking of his answer to that claim and entry of default judgment against him. *See Schwartz*, 944 S.W.2d at 436; *Fears*, 654 S.W.2d at 529-30. Therefore, the entry of default judgment against Robert in his individual capacity on the conversion claim was a final disposition of that claim, leaving only the issue of damages to be litigated and precluding the filing of any further pleadings or answers raising affirmative defenses. *See Fears*, 654 S.W.2d at 528. The entry of default judgment also precluded the district court from later entering j.n.o.v. on the conversion claim. The district court struck from the record only those answers and amended answers related to the conversion claim against Robert in his individual capacity that were filed by Robert after entry of the default judgment. The district court granted j.n.o.v. on the breach of fiduciary duty and negligence claims, making any alleged error in disallowing him to assert affirmative defenses for those claims moot.

Award of Prejudgment Interest

Robert argues that the district court erred by awarding prejudgment interest to be calculated from November 30, 1987, to August 20, 1997, because the delay in resolution of the suit resulted from Tom and John's delay in their pursuit of litigation. Robert also contends that any prejudgment interest is statutorily limited to 10% to be compounded annually using simple-interest calculation, therefore, the district court erred by calculating interest compounded daily. Robert bases his arguments on TEX. FIN. CODE ANN. §§ 304.102-304.108 (formally TEX. REV. STAT. ANN. art. 5069-1.03 to 5069-1.05).

The award of prejudgment interest has two legal sources: (1) general principles of equity, and (2) enabling statute. *Johnson &*

Higgins of Texas, Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 528 (Tex. 1998); *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 553-54 (Tex. 1985). The source of the award of prejudgment interest in a case involving a conversion claim is the equitable principles derived from the common law controlling case, *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d at 553-54. *Associated Telephone Directory Publishers, Inc. v. Five D's Pub. Co.*, 849 S.W.2d 894, 899-900 (Tex.App.–Austin 1993, no writ).

Driven by its desire to fully compensate injured plaintiffs in personal injury cases, the Texas Supreme Court held in *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d at 553-54, that prejudgment interest should be compounded daily on damages that accrued prior to judgment. The rationale in *Cavnar* has been extended to other types of cases and causes of action, including conversion. *See O'Reilly v. Grafham*, 797 S.W.2d 399, 401-02 (Tex.App.–Austin 1990, no writ); *see also Associated Telephone Directory Publishers, Inc.*, 849 S.W.2d at 899-900 (*Cavnar* principles and computation of prejudgment interest applies to conversion cause of action). *Cavnar* was codified in TEX.REV.STAT.ANN. art. 5069-1.05 § 6, now TEX. FIN. CODE ANN. §§ 304.102-304.108, which established the recovery of prejudgment interest in personal injury, wrongful death, and property damage actions. Section 6(g), now TEX. FIN. CODE ANN. §§ 304.103, modified the calculation of prejudgment interest, requiring it to be computed as simple interest. *See* TEX. FIN. CODE ANN. §§ 304.103.

Cavnar's common law, equitable application to non-personal injury cases survived the codification, and in those cases prejudgment interest continued to be compounded daily on damages that accrued prior to judgment. *See Spangler v. Jones*, 861 S.W.2d 392, 398-99 (Tex.App.–Dallas 1993, writ denied); *Shell Pipeline Corp. v. Coastal States Trading, Inc.*, 788 S.W.2d 837, 848-49 (Tex.App.–Houston [1st Dist.] 1990, writ denied). Under *Cavnar*, prejudgment interest accrued beginning six months after the occurrence of the event giving rise to the cause of action, and the district court had no discretion to toll the accrual of interest due to delay cause by either party. However, under

the common law rule, the six month delay did not apply to conversion causes of action. *See Associated Telephone Directory Publishers, Inc.*, 849 S.W.2d at 900. When a plaintiff prevailed on a conversion claim, he was entitled to receive as damages the value of the property on the date of conversion plus legal prejudgment interest for loss of the use of the property *from the date of conversion until the date of judgment. See id.*

However, the Supreme Court recently modified *Cavnar*'s application to non-personal injury cases, adopting the Legislature's policy underlying codification of *Cavnar*'s rule in Section 6(g). *See Johnson & Higgins of Texas*, 962 S.W.2d at 528-32. *Johnson & Higgins* applies to conversion claims, and therefore the instant case, because it applies to all cases in which the source of prejudgment interest is general principles of equity under the common law. *Id. Johnson & Higgins* held that equitable prejudgment interest should accrue at the rate of postjudgment interest (10%) and should be computed as simple interest. *See id.* at 532. The prejudgment interest begins to accrue at the earlier of 180 days after the defendant receives notice of a claim or the date suit was filed. *Id.* at 531.

While *Johnson & Higgins* applies to all cases in which the application of prejudgment interest is derived from the common law, the issue becomes whether *Johnson & Higgins* applies retroactively to the district court's calculation of prejudgment interest in this case, as it was issued during the pendency of this appeal. *Johnson & Higgins* addressed the issue of retroactivity stating, "Our common law prejudgment interest holding applies to all cases in which judgment is rendered on or after December 11, 1997, and to all other cases currently in the judicial process in which the issue has been preserved." *Id.* at 533. This case was clearly in the judicial process at the time *Johnson & Higgins* was issued. Robert raised the issue of calculation of prejudgment interest in his motion for new trial. Therefore, *Johnson & Higgins* applies to this case.

The district court's calculation of prejudgment interest was rendered erroneous by *Johnson & Higgins* because the district court

compounded interest daily and began accrual at the time conversion occurred. Because *Johnson & Higgins* renders the district court's calculation of prejudgment interest erroneous, this court will reverse the district court's judgment on this issue; however, this court must remand the case for further proceedings in light of the change in the applicable law during pendency of the appeal. *See Blair v. Fletcher*, 849 S.W.2d 344, 349 (Tex. 1993)("When applicable law changes during pendency of the appeal, the court of appeals must render its decision in light of the change in law.")

Finally, we reject Robert's argument that the district court erred by awarding prejudgment interest because any delay was caused by Tom and John. Under the common law rule, the district court had no discretion to lessen or increase the interest amount or delay accrual of prejudgment interest due to delays caused by either party. *See Matthews v. DeSoto*, 721 S.W.2d 286, 287 (Tex. 1986). The codification of Section 6(g) allowed the district court such discretion. Because *Johnson & Higgins* established a clear new rule for the accrual of prejudgment interest under the common law, but was silent on the issue whether the district court acquired discretion to toll accrual of prejudgment interest based on the delay of either party, we hold that the common law rule remains intact. The district court did not have discretion to delay accrual of prejudgment interest based on any alleged delay caused by Tom and John.

Because the district court may not lessen the amount of prejudgment interest based on delays cause by Tom and John, we reject Robert's argument that the district court erred. *See id.*

Insufficiency of Pleadings to Support Default Judgment and Damages for Conversion

Robert argues that the district court erred by denying his special exceptions and entering judgment on the conversion claim because Tom and John failed to adequately plead the cause of action. Robert contends Tom and John failed to allege the specific property converted, its fair market value, and the time the conversion occurred.

Robert contends Tom and John's Second Amended Original Petition failed to sufficiently plead the elements of conversion to give him fair notice of the case for damages.

To the extent that Robert attempts to challenge the district court's original entry of default judgment, his argument fails. Robert should have challenged the default judgment on this basis in his writ of mandamus to this court in 1992. *See Amstadt*, 919 S.W.2d at 652.

Robert contends that the pleadings do not support the default judgment, Robert does not argue that the amended petitions were deficient to give him fair notice of potential damages. To the extent that Robert attempts to avoid application of the default judgment by arguing that the pleadings did not sufficiently plead the cause of action to support an award of damages, his argument fails. Because default judgment was entered and affirmed by this court, the claim for conversion went to the jury to decide damages only, not liability. *See Schwartz*, 944 S.W.2d at 436; *Fears*, 654 S.W.2d at 529-30. Any deficiency in the pleadings would affect the damage award only, without affecting the original issuance of the default judgment. Any alleged deficiency in the pleadings to support the default judgment did not affect Robert's ability to defend the claim for damages.

Legal and Factual Sufficiency of Evidence to Support Jury's Assessment of Damages on Conversion Claim

Without disputing the evidentiary basis for the specific award of damages, Robert argues that the evidence is legally and factually insufficient to support the jury's findings on damages related to the conversion claim. Robert argues that Tom and John failed to prove deprivation of property to which they had a title and right to possession and thereby failed to prove their entitlement to damages.

This court reviews legal insufficiency points of error by considering only the evidence and all reasonable inferences that support the jury finding while disregarding all evidence and inferences to the contrary. *See Orozco v. Sander*, 824 S.W.2d 555, 556 (Tex. 1992). If

there is more than a scintilla of evidence to support the finding, the no evidence challenge must fail. *Id.* If the evidence is so weak as to do no more than create a mere surmise or suspicion of its existence, its legal effect is that it is no evidence. *See Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 182 (Tex. 1995). To recover damages, the burden is on the plaintiff to produce evidence from which the jury may reasonably infer that the damages claimed resulted from the defendant's conduct. *Id.* at 181; *Texarcana Mem'l Hosp., Inc. v. Murdock*, 946 S.W.2d 836, 838 (Tex. 1997). In considering a factual sufficiency point, we assess all the evidence and reverse for a new trial only if the challenged finding is so against the great weight and preponderance of the evidence as to be manifestly unjust. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660, 661 (1951).

The issue of right and entitlement to possession was determined by the default judgment on the conversion claim. Robert does not contend that the evidence supporting the verdict on damages was insufficient, nor does he explain how the evidence presented on damages failed to support the verdict. Instead, Robert contends that upon the death of Louis, he became the owner of an was entitled to possession of all ranch assets according to a written contract between Louis and the Mexican landowners. This argument is refuted by the stipulations filed by the parties in this court on May 28, 1998.

In the stipulations is an affidavit from Jose F. Cortes Lozano which states that the transfer of interest in the ranching operations from Louis Qualia to Robert Qualia entitled Robert to a 1/4 interest in the operations, and upon Louis' death, Kathleen was bestowed the remaining 3/4 interest. The affidavit also stipulates that all of the children, Tom and John included, were entitled to proportionate distribution of the proceeds of Kathleen's 3/4 interest in the ranching operation upon her death.[1]

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[1]The stipulations include another affidavit from Hugo G. Cuesta Leano which conflicts with Mr. Cortes Lozano's affidavit in that it attests that the livestock of the ranching operation should not be included as part of Kathleen's estate assets. Nevertheless, Mr. Cuesta

Because the issue of right and entitlement to property was determined by default judgment and the stipulations filed by the parties, Robert's argument must fail. The evidence was legally and factually sufficient to support the jury's award of damages.

Legal and Factual Sufficiency of Evidence to Support District Court's Imposition of Constructive Trust

Robert argues that the evidence is legally insufficient to support the district court's imposition of a constructive trust. Robert contends that Tom and John failed to establish the elements of entitlement to a constructive trust.

Conversion is the wrongful exercise of dominion and control over another's property in denial of or inconsistent with his rights. *Virgil T. Walker Constr. Co., Inc. v. Flores*, 710 S.W.2d 159, 160 (Tex.App.–Corpus Christi 1986, no writ); *Accent Builders Co., Inc. v. Southwest Concrete Sys., Inc.*, 679 S.W.2d 106, 100 (Tex.App.–Dallas 1984, writ ref'd n.r.e.). A constructive trust is an equitable remedy based on the court's concern for preventing unjust enrichment in the absence of any legally enforceable fiduciary relationship. *Hamblet v. Coveney*, 714 S.W.2d 126, 127-128 (Tex.App.–Houston [1st Dist.] 1986, writ ref'd n.r.e.). A constructive trust is imposed by law where there is a fiduciary or confidential relationship and the person holding legal title would profit from a wrong or would be unjustly enriched if he were permitted to keep the property. *Johnston v. Mabrey*, 677 S.W.2d 236, 239-40 (Tex.App.–Corpus Christi 1984, no writ); *First Nat'l Bank of Amarillo v. Bauert*, 622 S.W.2d 464, 466 (Tex.App–Amarillo 1981, no writ).

Upon the entry of default judgment against Robert on the claim of conversion, all allegations of fact set out in Tom and John's petition were deemed admitted. *See Schwartz*, 944 S.W.2d at 436; *Fears*, 654 S.W.2d at 529-30. The default judgment determined Robert

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Leano's affidavit does not dispute the stipulations of the children's proportional entitlement to estate assets included in Mr. Cortes Lozano's affidavit.

exercised wrongful dominion or control over Tom and John's property in a manner inconsistent with their rights. The evidence is ample to sustain the existence of a fiduciary relationship between Robert, as independent executor of Kathleen's estate, and Tom and John, as heirs, before and apart from the transactions here involved. *See Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962). Because wrongful dominion or control of property and the existence of a fiduciary relationship were established as a matter of law, the evidence is legally sufficient to support the imposition of a constructive trust over the assets converted. *See Newman v. Link*, 866 S.W.2d 721, 725-26 (Tex.App–Houston [14th Dist.] 1993), *writ denied per curiam*, 889 S.W.2d 288 (Tex. 1994); *Batten v. Batten*; 497 S.W.2d 394, 398 (Tex. Civ. App.–Houston [1st Dist.] 1972, writ ref'd n.r.e.). Therefore, Robert's argument is without merit. *Instruction to Jury to Include Attorney's Fees in Assessment of Exemplary Damages*

Robert argues that the district court erred by permitting the jury to include attorney's fees in its assessment of exemplary damages. Robert contends that the Texas Supreme Court's decision in *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994) precludes the assessment of exemplary damages for attorney fees.

Robert's argument is without merit. Exemplary damages may include attorney's fees and a jury may be instructed to consider that evidence only in assessing exemplary damages. *See Hofer v. Lavender*, 679 S.W.2d 470, 474 (Tex. 1984); *Gannett Outdoor Co. of Texas v. Kubeczka*, 710 S.W.2d 79, 91 (Tex.App.–Houston [14th Dist.] 1986, no writ). Robert's assertion is not supported in *Transportation Ins. Co. v. Moriel*.

CONCLUSION

All parties attempt to relitigate unfavorable rulings on issues already determined by this court and the underlying courts. The default judgment is a final disposition of Robert's liability on the conversion claim, and its propriety was affirmed by this court. The county court's determination of the breach of fiduciary duty and negligence claims

against Robert as independent executor was also a final disposition of those matters, and thereby precluded relitigation of those claims in the district court. Therefore, the district court did not err by entering j.n.o.v. on the breach of fiduciary duty and negligence claims and entering judgment on the conversion claim. The district court's award of damages was not in error; however, the district court's calculation of prejudgment interest was erroneous in light of recent Texas Supreme Court opinion, *Johnson & Higgins of Texas v. Kenneco Energy, Inc.*

The district court's judgment is affirmed in party and reversed and reversed and remanded in part for recalculation of prejudgment interest in conformity with *Johnson & Higgins*.

Catherine Stone, Justice

DO NOT PUBLISH

Court of Appeals
Fourth Court of Appeals District of Texas
San Antonio

JUDGMENT

No. 04-97-933-CV

Robert **QUALIA**,
Appellant

v.

Thomas M. **QUALIA** & John **QUALIA**,
Appellees

From the 63rd Judicial District Court of Val Verde County, Texas
Trial Court No. 17,780
Honorable R.L. Eschenburg, Judge Presiding

BEFORE JUSTICE LÓPEZ, JUSTICE STONE, AND
JUSTICE DUNCAN

In accordance with this Court's opinion of this date, the judgment of the trial court is AFFIRMED in part and REVERSED and REMANDED in part for further proceedings. It is ORDERED that all costs be assess against the party who incurred them. The clerk of the district court is directed to release the remaining amount of the cash deposit in lieu of cost bond filed by Robert Qualia to the Law Offices of Moulton S. Dowler as attorney for appellant Robert Qualia.

SIGNED: AUGUST 5, 1998

/s/ Catherine Stone
CATHERINE STONE
JUSTICE

CAUSE NO. 17,780

THOMAS M. QUALIA AND JOHN QUALIA	§	IN THE DISTRICT COURT
	§	
vs.	§	63RD JUDICIAL DISTRICT
	§	
ROBERT QUALIA, INDEPENDENT EXECUTOR OF THE ESTATE OF KATHLEEN G. QUALIA, DECEASED AND ROBERT QUALIA, INDIVIDUALLY	§	VAL VERDE COUNTY, TEXAS

JUDGMENT

On the 27th day of January, 1997, came on to be heard the above-styled and numbered cause. Thomas M. Qualia and John Qualia, Plaintiffs, appeared in person and by and through their attorneys of record, and announced ready for trial. Robert Qualia, appearing individually and as Independent Executor of the Estate of Kathleen G. Qualia, Deceased, Defendant , appeared in person and by and through his attorneys of record, and announced ready for trial. A jury having been previously demanded, a jury consisting of twelve qualified jurors was duly empaneled and the case proceeded to trial.

At the conclusion of the evidence, and after hearing the argument of counsel, the Court submitted the case to the jury on twelve questions. On January 31, 1997, the jury returned its verdict. The Charge of the Court, including the questions and verdict of the jury is hereby incorporated herein by reference for all purposes as if set forth verbatim. On July 23, 1997, the Court heard the Defendant's Motion for Judgment Notwithstanding the Verdict and the Defendant's

Objections to Plaintiffs' Motion for Judgment. After reviewing the pleadings, and having heard the evidence at trial and the arguments of counsel, the Court finds that the Motion for Judgment Notwithstanding the Verdict and Defendant's Objections to Plaintiffs' Motion for Judgment should be granted in part and denied in part.

It is, therefore, ORDERED that Defendant's Motion for Judgment Notwithstanding the Verdict and Defendant's Objections to Plaintiff's Motion for Judgment are granted with respect to the breach of fiduciary duty and the negligence claims against Robert Qualia (Special Issues No. 4-12) on the ground that said claims are barred under the doctrine of res judicata by the judgment in Cause No. 880, in the County Court at Law, Val Verde County, Texas, styled Thomas M. Qualia and John Qualia vs. Robert Qualia, Independent Executor of the Estate of Kathleen Qualia, Deceased, and Robert Qualia and by the statute of limitations. Except as expressly granted herein, Defendant's Motion for Judgment Notwithstanding the Verdict and Defendant's Objections to Plaintiffs' Motion for Judgment are DENIED.

The Court having heard the evidence and arguments of counsel is of the opinion that judgment should be rendered in favor of Plaintiffs, Thomas M. Qualia and John Qualia, against Robert Qualia with respect to Special Issues No. 1, No. 2 and No. 3.

It is now, therefore, ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. It is ORDERED that a constructive trust in favor of Plaintiffs, Thomas M. Qualia and John Qualia, be and hereby is imposed upon the following assets with Robert Qualia as the constructive trustee for the benefit of Plaintiffs:

(a) An 18% interest in the 1978 Cessna TU-206 Aircraft, registration #XB-AKX, serial #04362;

(b) 30% of Robert Qualia's shares or other interest in the Mexican corporation know as Agropecuaria Santa Catalina, S. de R. L.;

(c) 18% interest in all equipment located on the following Ranches: Catalina, Caracol, Charro, San Lorenzo and El Faison, the State of Coahuila, Republic of Mexico; and

(d) 30% interest in the 6,500 sheep located on the following Ranches: Catalina, Caracol, Charro, San Lorenzo and El Faison, the State of Coahuila, Republic of Mexico, plus an 18% interest in all sheep in excess of 6,500 and an 18% interest in all other livestock (including goats, cattle, horses and mules) located on said Ranches.

Robert Qualia is further ORDERED as constructive trustee to convey to Plaintiffs the above-described interest in said assets.

2. Plaintiff Thomas M. Qualia shall have and recover judgment against Robert Qualia in the following amounts:

(a) The sum of ONE HUNDRED EIGHTY THREE THOUSAND DOLLARS AND NO/100 DOLLARS ($183,000.00) as actual damages for conversion;

(b) The sum of TWO HUNDRED NINETY-EIGHT THOUSAND TWENTY-NINE AND NO/100 DOLLARS ($298,029.00) as pre-

judgment interest from November 30, 1987 to date of Judgment on the sum awarded as actual damages for conversion;

(c) The sum of TWO THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($2,500.00) as attorney's fees pursuant to the Order of the Honorable Judge Thurmond of August 29, 1991.

3. Plaintiff John Qualia shall have and recover judgment against Robert Qualia in the following amounts:

(a) The sum of ONE HUNDRED EIGHTY THREE THOUSAND DOLLARS AND NO/100 DOLLARS ($183,000.00) as actual damages for conversion;

(b) The sum of TWO HUNDRED NINETY-EIGHT THOUSAND AND TWENTY-NINE AND NO/100 DOLLARS ($298,029.00) as pre-judgment interest from November 30, 1987 to date of Judgment on the sum awarded as actual damages for conversion;

(c) The sum of TWO THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($2,500.00) as attorney's fees pursuant to the Order of the Honorable Judge Thurmond of August 29, 1991.

4. It is further ORDERED, ADJUDGED AND DECREED that each of the individuals listed below shall have and recover judgment against Robert Qualia for exemplary damages as found by the jury in the following amounts:

(a) Thomas M. Qualia - ONE HUNDRED THOUSAND AND NO/100 DOLLARS ($100,000.00); and

(b) John Qualia - ONE HUNDRED THOUSAND AND NO/100 DOLLARS ($100,000.00).

5. It is further ORDERED, ADJUDGED AND DECREED that the amounts awarded herein in the sum of $1,167,058.00 shall bear post-judgment interest at the rate of 10% per annum from the date of this Judgment until paid..

6. It is further ORDERED that Robert Qualia provide Plaintiffs, Thomas M. Qualia and John Qualia, with a full accounting (including, but not limited to, livestock inventories, equipment inventories, profit and loss statements, balance sheets, general ledgers, bank statements, Mexican and U.S. tax returns, canceled checks, and Shareholders' and Directors' meeting minutes) of Agropecuaria Santa Catalina, S. de R.L. from its inception, and also a full accounting (as described herein) of the ranching operation conducted by Robert Qualia located in the Republic of Mexico.

7. It is further ORDERED that any sums actually recovered by Plaintiffs, Thomas M. Qualia and John Qualia, pursuant to the constructive trusts imposed in paragraph 1 of this Judgment shall be credited on a dollar-for-dollar basis against the monetary awards set forth in paragraphs 2 through 5 of this Judgment.

8. It is further ORDERED that all costs of court expended or incurred in this cause are hereby taxed as costs and adjudged against Robert Qualia.

9. All writs and processes for the enforcement and collection of this Judgment or the costs of court shall issue as necessary.

10. All other relief not expressly granted herein is hereby denied.

SIGNED this 20 day of August, 1997.

/s/ R L Eschenburg
HONORABLE ROBERT LEE ESCHENBURG
JUDGE PRESIDING

APPROVED AS TO FORM:

DROUGHT & PIPKIN, L.L.P.
2600 Weston Centre
112 E. Pecan Street
San Antonio, Texas 78205
Telephone No. (210) 225-4031
Telecopier No. (210) 222-0586

By: /s/ James L. Drought
JAMES L. DROUGHT
State Bar No. 06135000
Patricia J. Schofield

State Bar No. 17800900

ATTORNEYS FOR PLAINTIFFS

GRESHAM, DAVIS, GREGORY,
WORTHY & MOORE
112 East Pecan Street
Suite 900
San Antonio, Texas 78205
(210) 226-4157 Telephone
(210) 226-5154 Telecopier

By_____
MOULTON S. DOWLER, JR.
State Bar No. 06083200
SAMUEL H. BAYLESS
State Bar No. 01941000

ATTORNEYS FOR DEFENDANT

LAW OFFICES
SOULES & WALLACE
ATTORNEYS-AT-LAW
A PROFESSIONAL CORPORATION
FROST BANK TOWER
100 W. HOUSTON STREET,
SUITE 1500
SAN ANTONIO, TEXAS 78205-1457
(210) 224-9144
TELEFAX: (210) 224-7073

PAUL D. ANDREWS
KEITH M. BAKER
PATRICIA ANN BATH
RICHARD M. BUTLER
HERBERT GORDON DAVIS
R. RENE ESCOBEDO
WAYNE I. FAGAN
JERRY J. FULTON
PHIL STEVEN KOSUB
ELIZABETH J. LINDELL
NANCY B. McCAMISH
CLYDE B. McCORMICK II
JAMES E. MONTGOMERY
SARA MURRAY

WRITER'S DIRECT DIAL NUMBER:

SUSAN S. PATTERSON
ROBINSON C. RAMSEY
MARC J. SCHNALL
BRAD L. SKLENCAR
LUTHER H. SOULES III
BRUCE K. SPINDLER
WILLIAM T. SULLIVAN
THOMAS H. VETCH
JAMES P. WALLACE

OF COUNSEL
LUIS R. GARCIA
(1919-1996)
ROBERT L. ESCHENBURG II

August 13, 1997

Mr. James L. Drought
Drought & Pipkin, L.L.P.
2000 Weston Centre
112 East Pecan
San Antonio, Texas 78205

Moulton S. Dowler, Jr.
Gresham, Davis, Gregory, Worthy & Moore, P.C.
112 E. Pecan #900
San Antonio, Texas 78205

RE: Cause No. 17,780
Thomas M. Qualia and John Qualia v. Robert Qualia
63rd Judicial District Court, Val Verde County

Dear Counselors:

I still rule that the Plaintiffs' causes of action against Robert Qualia, Independent Executor of the Estate of Kathlen G. Qualia, deceased, are barred by the doctrine of Res Judicata and the Statute of

Limitations. Mr. Drought is to prepare, for my signature, a Final Judgment.

Sincerely,

/s/ Robert L. Eschenburg II/S
Robert L. Eschenburg II
Senior District Judge

RLE/sdb

LAW OFFICES
SOULES & WALLACE
ATTORNEYS-AT-LAW
A PROFESSIONAL CORPORATION
FROST BANK TOWER
100 W. HOUSTON STREET,
SUITE 1500
SAN ANTONIO, TEXAS 78205-1457
(210) 224-9144
TELEFAX: (210) 224-7073

PAUL D. ANDREWS
KEITH M. BAKER
PATRICIA ANN BATH
RICHARD M. BUTLER
HERBERT GORDON DAVIS
R. RENE ESCOBEDO
WAYNE I. FAGAN
JERRY J. FULTON
PHIL STEVEN KOSUB
ELIZABETH J. LINDELL
NANCY B. McCAMISH
CLYDE B. McCORMICK II
JAMES E. MONTGOMERY
SARA MURRAY

SUSAN S. PATTERSON
ROBINSON C. RAMSEY
MARC J. SCHNALL
BRAD L. SKLENCAR
LUTHER H. SOULES III
BRUCE K. SPINDLER
WILLIAM T. SULLIVAN
THOMAS H. VETCH
JAMES P. WALLACE

OF COUNSEL:
LUIS R. GARCIA
(1919-1996)
ROBERT L. ESCHENBURG II

WRITER'S DIRECT DIAL NUMBER:

July 28, 1997

Mr. James L. Drought
Drought & Pipkin, L.L.P.
2000 Weston Centre
112 East Pecan
San Antonio, Texas 78205

Moulton S. Dowler, Jr.
Gresham, Davis, Gregory, Worthy & Moore, P.C.
112 E. Pecan #900
San Antonio, Texas 78205

RE: Cause No. 17,780
Thomas M. Qualia and John Qualia v. Robert Qualia
63rd Judicial District Court, Val Verde County

Dear Counselors:

I will grant judgment for Plaintiffs based on the jury's answers to Questions No. 1, 2, and 3.

I will grant Defendant's Motion for Judgment Notwithstanding Verdict on the jury's answers to Questions No. 4, 5, 6, 7, 8, 9, 10, 11, and 12. Judge Thurman's Order of August 29, 1991 only sanctioned

Robert Qualia, individually. I cannot speculate that Judge Thurman meant by his order to also sanction Robert Qualia, as Executor. I feel that I am bound by the wording in his Order of August 29, 1997. Because of the Final Judgment in Cause No. 880 in the County Court of Law of Val Verde County, Texas in favor of Robert Qualia, as Independent Executor of the Estate of Kathleen G. Qualia, Deceased, Plaintiffs' causes of action against Robert Qualia, as Executor, are barred by the doctrine of Res Judicata.

Sincerely,

/s/ Robert L. Eschenburg II/S
Robert L. Eschenburg II
Senior District Judge

NO. 17,780

THOMAS M. QUALIA AND JOHN QUALIA	§	IN THE DISTRICT COURT
	§	
	§	
vs.	§	63RD JUDICIAL DISTRICT
	§	
ROBERT QUALIA,	§	
INDEPENDENT EXECUTOR	§	
OF THE ESTATE OF	§	
KATHLEEN G. QUALIA,	§	
DECEASED AND ROBERT	§	VAL VERDE COUNTY,
QUALIA, INDIVIDUALLY	§	TEXAS

ORDER ON MOTION TO REINSTATE SANCTIONS

On March 13, 1997, came on to be heard the Plaintiffs' Motion to Reinstate the Sanctions of the Court's Order of August 29, 1991. All parties appeared by and through their attorneys of record and announced ready. The Court, after having examined the pleadings and hearing the arguments of counsel, is of the opinion that said Motion to Reinstate the Sanctions of the Court's Order of August 29, 1991 should be and hereby is GRANTED.

It is therefore ORDERED that the sanctions imposed in the August 29, 1991 Order shall apply to Robert Qualia, individually. It is further ORDERED that the Amended Answer filed by Defendant Robert Qualia January 27, 1997, and all previous answers filed by Defendant Robert Qualia, individually, be stricken in their entirety. It is further ORDERED that the Interlocutory Default Judgment on claims of conversion and the award of attorneys' fees as set forth in the Order of August 29, 1991 entered against Defendant Robert Qualia, individually, remain in full force and effect.

SIGNED this 1st day of April, 1997.

/s/ Robert L. Eschenburg
HON. ROBERT L.
ESCHENBURG

APPROVED AS TO FORM:

DROUGHT & PIPKIN, L.L.P.
2600 Weston Centre
112 E. Pecan Street
San Antonio, Texas 78205
Telephone No. (210) 225-4031
Telecopier No. (210) 222-0586

By /s/ James L. Drought
JAMES L. DROUGHT
State Bar No. 06135000

ATTORNEYS FOR PLAINTIFFS
THOMAS M. QUALIA AND JOHN QUALIA

GRESHAM, DAVIS, GREGORY,
WORTHY & MOORE
A Professional Corporation
112 East Pecan Street, Suite 900
San Antonio, Texas 78205-1542
Telephone No. (512) 226-4157
Telecopier No. (512) 226-5154

By _____
MOULTON DOWLER
State Bar No. 06083200

ATTORNEYS FOR DEFENDANT

NO. 17,780

THOMAS M. QUALIA AND JOHN QUALIA	§	IN THE DISTRICT COURT
	§	
vs.	§	63RD JUDICIAL DISTRICT
	§	
ROBERT QUALIA, INDEPENDENT EXECUTOR OF THE ESTATE OF KATHLEEN G. QUALIA, DECEASED AND ROBERT QUALIA, INDIVIDUALLY	§	VAL VERDE COUNTY, TEXAS

ORDER

On January 24, 1997, came on to be heard the Plaintiffs' Motion for Reconsideration of Order of January 21, 1997 granting in part Defendant's Letter Motion for Leave to File Defendant's First Amended Answer and for Reconsideration of Order Striking Defendant's Answer. All parties appeared by and through their attorneys of record and announced ready. The Court, after having examined the pleadings and hearing the arguments of counsel, is of the opinion that said Motion for Reconsideration of Order of January 21, 1997 should be and hereby is DENIED.

SIGNED this 28th day of January, 1997.

/s/ Robert L. Eschenburg
HON. ROBERT L. ESCHENBURG

APPROVED AS TO FORM:

DROUGHT & PIPKIN, L.L.P.
2600 Weston Centre
112 E. Pecan Street
San Antonio, Texas 78205
Telephone No. (210) 225-4031
Telecopier No. (210) 222-0586

By /s/ James L. Drought
JAMES L. DROUGHT
State Bar No. 06135000

ATTORNEYS FOR PLAINTIFFS
THOMAS M. QUALIA AND JOHN QUALIA

GRESHAM, DAVIS, GREGORY,
WORTHY & MOORE
A Professional Corporation
112 East Pecan Street, Suite 900
San Antonio, Texas 78205-1542
Telephone No. (512) 226-4157
Telecopier No. (512) 226-5154

By /s/ Moulton Dowler
MOULTON DOWLER
State Bar No. 06083200

ATTORNEYS FOR DEFENDANT

CAUSE NO. 17,780

THOMAS M. QUALIA AND JOHN QUALIA	§	**IN THE DISTRICT COURT**
	§	
	§	
VS.	§	**63RD JUDICIAL DISTRICT**
	§	
ROBERT QUALIA, INDEPENDENT EXECUTOR OF THE ESTATE OF KATHLEEN G. QUALIA, DECEASED AND ROBERT QUALIA, INDIVIDUALLY	§	**VAL VERDE COUNTY, TEXAS**

ORDER

On January 21, 1997, came on to be heard the Motion for Reconsideration of Defendant's Motion for Leave to File Defendant's First Amended Answer and for Reconsideration of Order Striking Defendant's Answer filed by Defendant, ROBERT QUALIA. All parties appeared by and through their attorneys of record and announced ready. The Court, after having examined the pleadings and hearing the arguments of counsel, is of the opinion that said Motion for Leave to File Defendant's First Amended Answer and for Reconsideration of Order Striking Defendant's Answer should be granted in part as hereinafter ordered.

It is, therefore, ORDERED that Defendant may file an Amended Answer raising the affirmative defenses of res judicia, collateral estoppel and limitations.

It is FURTHER ORDERED that the filing of the Amended Answer permitted herein does not set aside the default judgment granted against Defendant pursuant to the Order signed by the Honorable George M. Thurmond on August 29, 1991.

SIGNED this 24 day of January, 1997.

/s/ Robert L. Eschenburg
HON. ROBERT L. ESCHENBURG

APPROVED AS TO FORM:

DROUGHT & PIPKIN, L.L.P.
Suite 2600
112 E. Pecan Street
San Antonio. Texas 78205
Telephone: (210) 225-4031
Telecopier: (210) 222-0586

By: /s/ James L. Drought
JAMES L. DROUGHT
State Bar No. 06135000

ATTORNEYS FOR PLAINTIFFS
THOMAS M. QUALIA AND JOHN QUALIA

GRESHAM, DAVIS, GREGORY
WORTHY & MOORE
112 East Pecan Street, Suite 900
San Antonio, Texas 78205
Telephone: (210) 226-4157
Telecopier: 210) 226-5154

By: /s/ Samuel H. Bayless
MOULTON DOWLER
State Bar No. 06083200

ATTORNEYS FOR DEFENDANT

NO. 17,780

THOMAS M. QUALIA AND JOHN QUALIA	§	IN THE DISTRICT COURT
	§	
	§	
vs.	§	63RD JUDICIAL DISTRICT
	§	
ROBERT QUALIA,	§	
INDEPENDENT EXECUTOR	§	
OF THE ESTATE OF	§	
KATHLEEN G. QUALIA,	§	
DECEASED AND ROBERT	§	VAL VERDE COUNTY,
QUALIA, INDIVIDUALLY	§	TEXAS

ORDER

On the 14th day of October, 1996, came on to be heard Defendant's Motion for Leave to File Defendant's First Amended Answer, for Reconsideration of Order Striking Defendant's Answer, and for Reconsideration of Denial of Defendant's Motion for Summary and the Court, after considering the argument of counsel and reviewing the pleadings, finds that the Motion should be Denied.

Also came on to be considered Defendant's Special Exceptions and the Court, after considering the argument of counsel and reviewing the pleadings, finds that the Special Exceptions should be Denied.

It is THEREFORE ORDERED that the Defendant's Motion for Leave to File Defendant's First Amended Answer, for Reconsideration of Order Striking Defendant's Answer, and for Reconsideration of Denial of Defendant's Motion for Summary Judgment is hereby DENIED.

It is further ORDERED that Defendant's Special Exceptions are hereby DENIED.

SIGNED this 16th day of October, 1996.

/s/ John G. Yates
Honorable John G. Yates

APPROVED AS TO FORM:

GRESHAM, DAVIS, GREGORY,
WORTHY & MOORE
A Professional Corporation
112 East Pecan Street, Suite 900
San Antonio, Texas 78205-1542
Telephone No. (512) 226-4157
Telecopier No. (512) 226-5154

By /s/ Moulton S. Dowler, Jr.
Moulton S. Dowler, Jr.
State Bar No. 06083200
Samuel H. Bayless
State Bar No. 01941000
ATTORNEYS FOR DEFENDANT ROBERT QUALIA

DROUGHT & PIPKIN, L.L.P.
2600 Weston Centre
112 E. Pecan Street
San Antonio, Texas 78205
Telephone No. (210) 225-4031
Telecopier No. (210) 222-0586

By /s/ James L. Drought
James L. Drought
State Bar No. 06135000
ATTORNEYS FOR PLAINTIFFS THOMAS M. QUALIA AND JOHN QUALIA

CAUSE NO. 17,780

THOMAS M. QUALIA AND JOHN QUALIA	§	IN THE DISTRICT COURT
	§	
VS.	§	63 RD JUDICIAL DISTRICT
	§	
ROBERT QUALIA, INDEPENDENT EXECUTOR OF THE ESTATE OF KATHLEEN G. QUALIA, DECEASED, AND ROBERT QUALIA, INDIVIDUALLY	§	VAL VERDE COUNTY, TEXAS

ORDER REGARDING MARCH 5, 1996 HEARING

On this 5th day of March, 1996, came on to be heard the following motions filed by Robert Qualia, individually and as Independent Executor of the Estate of Kathleen G. Qualia: (a) Motion for Summary Judgment; (b) Motion for Protective Order and for Extension of Time to Respond to Discovery; (c) Objections and Motion to Quash Discovery; (d) Defendant's Motion for Postponement of Depositions; and (e) Defendant's Special Exceptions.

The Court, after hearing the argument of counsel and reviewing the pleadings, makes the following orders and findings:

1. Plaintiffs' objections to Defendant's summary judgment are sustained in part and overruled in part as set forth in the Order on John and Tom Qualia's Objections to Robert Qualia's Motion for Summary Judgment signed by the Court on March 5, 1996 and, as a result, Defendant's Motion for Summary Judgment is denied.

2. Defendant announced that his objections to Plaintiffs' discovery, as set forth in his Motion for Protective Order and for Extension of Time to Respond to Discovery, Objections and Motion to Quash Discovery, and Defendant's Motion for Postponement of Depositions, primarily concern the timing of the discovery in that the Defendant desired a ruling on the Motion for Summary Judgment before incurring the expense of answering discovery. Inasmuch as Defendant's Motion for Summary Judgment is denied, Defendant agreed to respond to the outstanding discovery and the Court orders that Defendant's responses are due on or before April 4, 1996.

3. Defendant announced that he was withdrawing his Special Exceptions at this time pending additional discovery by Plaintiffs, but that Defendant reserves the right to refile special exceptions at a future date if he deems it necessary and advisable.

SIGNED this 15th day of March, 1996.

/s/ John G. Yates
Judge John G. Yates

APPROVED AS TO FORM:

GRESHAM, DAVIS, GREGORY,
WORTHY & MOORE
112 East Pecan Street
Suite 900
San Antonio, Texas 78205
(210) 226-4157 Telephone
(210) 226-5154 Telecopier

By /s/ Moulton S. Dowler, Jr.
Moulton S. Dowler, Jr.
State Bar No. 06083200
Samuel H. Bayless

State Bar No. 01941000

ATTORNEYS FOR DEFENDANT ROBERT QUALIA

DROUGHT & PIPKIN, L.L.P.
2600 Weston Center
112 East Pecan Street
San Antonio, Texas 78205
(210) 225-4031 Telephone
(210) 222-0586 Telecopier

By /s/ James L. Drought
James L. Drought
State Bar No. 06135000

ATTORNEYS FOR PLAINTIFFS

CAUSE NO. 17,780

THOMAS M. QUALIA AND JOHN QUALIA	§	IN THE DISTRICT COURT
	§	
VS.	§	63RD JUDICIAL DISTRICT
	§	
ROBERT QUALIA, INDEPENDENT EXECUTOR OF THE ESTATE OF KATHLEEN G. QUALIA, DECEASED AND ROBERT QUALIA, INDIVIDUALLY	§	VAL VERDE COUNTY, TEXAS

ORDER ON JOHN AND TOM QUALIA'S OBJECTIONS TO ROBERT QUALIA'S MOTION FOR SUMMARY JUDGMENT

On this 5th day of March, 1996, came on to be heard Robert Qualia's Motion for Summary Judgment and the Court, after considering the argument of counsel, makes the following rulings on John and Tom Qualia's objections to Robert Qualia's Motion for Summary Judgment:

1. The Court sustains John and Tom Qualia's objection regarding Robert Qualia being able to rely on his First Amended Answer.

2. The Court overrules John and Tom Qualia's objections to Exhibits A through K attached to Robert Qualia's Motion for Summary Judgment.

3. The Court sustains John and Tom Qualia's objections to Robert Qualia's reliance on affirmative defenses in his Motion for Summary Judgment.

SIGNED this 5th day of March, 1996.

/s/ John G. Yates
Judge John G. Yates

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT OF TEXAS
SAN ANTONIO

OPINION

Appeal No. 04-92-00272-CV

ROBERT QUALIA,
Relator

v.

THE HONORABLE GEORGE M. THURMOND,
Respondent

Cause from the 63rd District Court of Val Verde County
Trial Court No. 3,890

ON RELATOR'S PETITION FOR WRIT OF MANDAMUS

Opinion by: Fred Biery, Justice

Sitting: Blair E. Reeves, Chief Justice
Alfonso Chapa, Justice
Fred Biery, Justice

Delivered and filed: July 8, 1992

RELATOR'S PETITION FOR WRIT OF MANDAMUS IS DENIED

In this mandamus proceeding, Robert Qualia, relator, asks this court to set aside three orders issued by the trial court which (1) ordered relator to produce factura books and an inventory of livestock for ranches located in Mexico; (2) struck Robert's answer to the conversion claim filed against him and awarded attorney's fees; and (3) ordered

that the real parties in interest, their representatives and experts be allowed entry onto and access to the ranches in Mexico. Robert contends that the order striking his pleadings does not comply with the standards for "death penalty" sanctions as set out by the supreme court in TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913 (Tex. 1991). In addition, he contends that the district court did not have jurisdiction because the underlying cause of action was a matter incident to an estate and should have been brought in the probate court. Moreover, Robert claims that the proceeding in the district court is an impermissible collateral attack on final orders of the probate court.

In response to Robert's contentions, the real parties in interest, Thomas and John Qualia (relator's brothers) contend that only one of the three orders is reviewable by mandamus. They assert that the order allowing access to and inspection of the ranches in Mexico is not directed at relator and the jurisdictional question posed by Robert cannot be determined in a mandamus proceeding. The real parties also contend that the order striking Robert's pleadings fully comports with the standards set out in TransAmerican. We agree and deny the writ of mandamus.

FACTS

Robert was appointed independent executor of the estate of Kathleen G. Qualia (the mother of Robert and the real parties in interest). On May 12, 1988, the application to discharge the personal representative and close the estate was approved by the probate court. In July, Thomas and John filed an application to reopen the estate in the probate court and later transferred that cause to the county court-at-law. The following May, Thomas and John filed their suit in district court against Robert individually and as the independent executor of their mother's estate alleging in part that Robert had converted assets of the estate in which they had an interest.

In July of 1990, the real parties in interest filed and served a notice of intention to take Robert's oral deposition and included a

subpoena duces tecum. In September, the real parties in interest filed an amended notice and subpoena requesting the factura books for five ranches in Mexico, bank statements, income tax returns for the estate and for Robert individually, and livestock inventories for the ranches. The first motion to compel was filed in November and the hearing was set for December 6, 1990.[1] The court did not make any rulings but

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[1]No statement of facts was filed with respect to this hearing. There is some reference to a prior hearing at the February 1 hearing wherein the court stated, I know what the -- what is sought because you were here last month or in late December, and I was hoping maybe things could be worked out by agreement." Relator's attorney responded with the following:

> Pursuant wanted [sic] to your comment about the last time we were here, it was my understanding that the court gave direction to Mr. Qualia to confer with his associates in Mexico to determine if there could be voluntary compliance, and I just want to represent to the court Mr. Qualia did follow the court's direction, did confer with his associates in Mexico, and they refused short of a court order from a Mexican court to provide those over to him for use in this procedure.

The court went on to state for the record that "this is the motion that was filed in this court on November 14, 1990 by the plaintiffs." At the end of the hearing, the court heard evidence concerning attorney's fees. The attorney for John and Thomas testified:

> Your Honor, as the court is aware, we have had to appear twice on the motion to compel, and there have been numerous other conversations, telephone calls. . .but I would testify to the court that our first hearing was conducted in Del Rio. I had to come to Del Rio that morning and meet with my clients, had the hearing, and returned. . . .Then today we again returned.

From the hearing on April 12, the December 6th hearing was referred to as follows:

> We came to court on December 6th. The court heard us and basically carried forward our motion to compel and our request for attorneys fees and et cetera, and my understanding in reviewing my notes, basically admonished the other side to get some production going in the next couple of weeks and let's see if we could get this thing going, but basically just carried this thing on.

The real parties in interest contend that because no statement of facts was filed from the December hearing, Robert failed to bring a complete record before this court. However, after oral argument, Robert filed a supplemental affidavit as to the completeness of the record. He states that no evidence was adduced at the first hearing and that the first hearing merely consisted of argument of counsel. The court does not require the parties to present a statement

carried the motion forward until February, 1991. At the February hearing, the judge ordered Robert to produce the factura books, the supporting documentation for the estate and his individual tax returns, and inventories within 30 days and to communicate the orders to the landowners in Mexico.

A second motion to compel was filed in March and sanctions were requested by the real parties in interest for Robert's failure to comply with the prior court order. A hearing was held on this motion, and the court struck Robert's pleadings and granted a default judgment in favor of the real parties in interest. In addition, the court awarded $5,000 in attorney's fees for the sanctions hearings. The court's order was signed on August 29, 1991. In addition to striking the pleadings, the court severed the conversion claims against Robert individually from the claims against Robert as independent executor. The claims against Robert as independent executor were dismissed without prejudice.

In February of 1992, Robert filed a motion for reconsideration of the August 29 order and again raised the jurisdictional issue. The trial court denied his motion.

STANDARD OF REVIEW

A writ of mandamus will issue to correct a "clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law." Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985, orig. proceeding). An abuse of discretion occurs when a trial court "reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." Id. A trial court is not given discretion "in determining what the law is or applying the law to the facts." Walker v. Packer, 827 S.W.2d 833, 840

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of facts consisting only of the argument of counsel. Barnes v. Whittington, 751 S.W.2d 493, 495 (Tex. 1988, orig. proceeding). Our denial of the writ is not based on the completeness of the record or lack thereof.

(Tex. 1992, orig. proceeding). An abuse of discretion will be found if the trial court fails to analyze or apply the law correctly. Id.

To obtain review of a discovery order by mandamus, the party seeking review must show that the remedy available via ordinary appeal is inadequate. Id. at 842. If the appellate court will be unable to cure the trial court's discovery error, the party will not have an adequate remedy by appeal. Should a trial court impose a discovery sanction which in effect precludes a decision on the merits of a party's claim, i.e. by striking pleadings or rendering a default judgment, "a party's remedy by eventual appeal is inadequate, unless the sanctions are imposed simultaneously with the rendition of a final, appealable judgment." Id. at 843.

With respect to the discovery sanctions, the writ of mandamus is the proper remedy. As in our recent decision, Hartford Accident & Indemnity Co. v. Abascal, No. 04-91-00511-CV, slip op. at 8 (Tex.App.–San Antonio, June 3, 1992, orig. proceeding)(en banc), the dispositive issue here is whether the relator has shown that the trial court abused its discretion in striking his defensive pleadings (general denial) in light of the guiding principles set out in TransAmerican Nat. Gas Corp. v. Powell, 811 S.W.2d 913 (Tex. 1991).

APPLICATION OF TRANSAMERICAN STANDARDS

In TransAmerican, the court measured the imposition of sanctions by two- standards. Id. at 917. The first standard requires a direct relationship "between the offensive conduct and the sanction imposed." The second standard requires the sanctions to be just and not excessive, i.e. "[t]he punishment should fit the crime." Id. The abuse of discretion standard is still used to review the trial court's imposition of death penalty sanctions. Hartford, No. 04-91-00511-CV, slip op. at 7 (Tex. App.–San Antonio, June 3, 1992, orig. proceeding)(en banc).

The trial judge in this case had before him conflicting evidence as to the availability of the factura books and the livestock inventories.[2] Robert's counsel even admitted that "the evidence is not at all clear as to Mr. Qualia's ability and position to produce factura books and other documents." The court found, after hearing testimony, that Robert Qualia had control over the factura books, and all he needed to do was to ask for them. Because the record reveals that the trial court was faced with a factual dispute concerning Robert's ability to produce the materials requested, and the evidence does not show that the trial court have reached but one contrary decision, we will not disturb the trial court's decision on this issue. Packer v. Fifth Court of Appeals, 764 S.W.2d 775, 776 (Tex. 1989); Johnson, 700 S.W.2d at 918.

With respect to the sanctions, Robert contends that the sanctions were not just because a direct relationship did not exist between the offensive conduct and the sanction. He claims that the documents go the amount of damages and not to the merits of their claims. We find, however, that the plaintiffs needed these documents not only to prove the amount of damages but also to see if in fact Robert converted some of the assets, the very heart of their claim.

Robert also claims that the trial court's order deprives him of defenses which have nothing to do with the production of the factura books, bank records, tax returns, or the livestock inventories. His defenses would have included the allegation that the probate court in Val Verde County had jurisdiction over the dispute because it was a

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[2] Robert contends that he does not have care, custody or control over the factura books and inventories, and after reasonable efforts he was unable to obtain the documents from the landowners. Robert's counsel mailed letters to the individual landowners advising them of the court's ruling and requesting the documents. Robert attached an affidavit to this response to the second motion to compel stating that he personally went and talked with each landowner but was denied access to the requested material. The judge also heard Robert's testimony at the February 1 hearing. Evidence was presented by the parties in interest showing that the general practice in Mexico was for the manager to keep the records or have access to them. Robert admitted that his brothers were able to obtain a current inventory of livestock at one of the ranches with little effort. He testified that he could get the information but it was not his to give.

matter incident to an estate, and the district court proceeding was an impermissible collateral attack on the final judgment of the probate court.[3] Robert also contends there is no evidence that he or his counsel acted with "callous disregard for the responsibilities of discovery under the rules" or that they acted in "flagrant bad faith" as required by TransAmerican before assessing such severe sanctions.

In this case, it is clear that the court was faulting Robert and not his counsel[4] for the failure to produce the documents. From the evidence before him, the judge concluded that Robert had the ability to produce the materials but was unwilling to do so. The documents went to the very heart of the conversion claim, and the court's striking of the general denial was not excessive under the circumstances. Robert was warned at the February 1 hearing of possible sanctions if he did not comply with the production request. In fact, the court heard evidence on attorney's fees as sanctions but decided to wait and see if Robert would comply with the order. The court stated, "I want Mr. Qualia to hear it [evidence on attorney's fees], because I want to impress on how things are building up here and how they can be avoided if we have a little cooperation on discovery here." This statement and the fact that the trial court had conducted three separate hearings concerning discovery and waited until after the second motion to compel was filed before it struck the pleadings indicate the court's patience with Mr. Qualia to produce the documents prior to ordering sanctions. The court's statement also indicates the court's finding of bad faith on the part of Robert Qualia. Therefore, we hold that the court did not abuse

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[3]Robert contends that the claim against him was a matter incident to the estate and therefore the county court-at-law had jurisdiction. If in fact the district court did not have jurisdiction over the claim, the result is a void judgment which is a nullity and subject to impeachment in any action, direct or collateral. Starnes v. Holloway, 779 S.W.2d 86, 94 (Tex. App.–Dallas 1989, writ denied). A judgment is void "only when it is shown that the court had no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act as a court." Browning v. Placke, 698 S.W.2d 362, 363 (Tex. 1985); see Cook v. Cameron, 733 S.W.2d 137, 140 (Tex. 1987).

[4]The record is imminently clear that Robert's counsel abided by all requests and orders of the trial judge.

its discretion in striking Robert's pleadings. With respect to the $5,000 in sanctions, mandamus relief is not available because no evidence was presented that the sanction impairs Robert's ability to continue with litigation. See Braden v. Downey, 811 S.W.2d 922, 929 (Tex. 1991).

As to Robert's request that we require Judge Thurmond to dismiss the underlying cause, we hold that subject-matter jurisdiction cannot be determined in a mandamus proceeding. Bell-Helicopter Textron, Inc. v. Walker, 787 S.W.2d 954, 955 (Tex. 1990, orig. proceeding) (writs of mandamus not to supervise or correct incidental rulings such as pleas to jurisdiction even if petition entitled to writ as a matter of law); Arbor v. Black, 695 S.W.2d 564, 566-67 (Tex. 1985, orig. proceeding); Texas Commerce Bank v. Prohl, 824 S.W.2d 228, 229 (Tex. App.–San Antonio, orig. proceeding) (remedy by mandamus available to resolve conflict in jurisdiction only when trial court first taking jurisdiction has been stopped from proceeding). We also deny Robert's request to vacate the order granting access to the ranches in Mexico. The order was not directed at him nor has any attempt been made to enforce it. Accordingly, the writ of mandamus is denied.

FRED BIERY,
Justice

DO NOT PUBLISH.

CAUSE NO. 17,780

THOMAS M. QUALIA AND JOHN QUALIA	§	IN THE DISTRICT COURT
	§	
VS.	§	63RD JUDICIAL DISTRICT
	§	
ROBERT QUALIA, INDEPENDENT EXECUTOR OF THE ESTATE OF KATHLEEN G. QUALIA, DECEASED AND ROBERT QUALIA, INDIVIDUALLY	§	VAL VERDE COUNTY, TEXAS

ORDER DENYING MOTION OF ROBERT QUALIA, DEFENDANT, FOR RECONSIDERATION OF ORDER DATED AUGUST 29, 1991, STRIKING DEFENDANT'S PLEADINGS AND GRANTING DEFAULT JUDGMENT

On the 21st day of April, 1992, came on to be heard the Motion of Robert Qualia, Defendant, for Reconsideration of Order dated August 29, 1991, Striking Defendant's Pleadings and Granting Default Judgment in the above captioned cause. The Court, after hearing the argument of counsel, reviewing the pleadings, and hearing the evidence in this cause, is of the opinion that same should be denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motion of Robert Qualia, Defendant, for Reconsideration of Order dated August 29, 1991, Striking Defendant's Pleadings and Granting Default Judgment be and the same is hereby denied.

SIGNED this 13th day of May, 1992.

/s/ George M. Thurmond
JUDGE PRESIDING

APPROVED AS TO FORM:

GRESHAM, DAVIS, GREGORY,
WORTHY & MOORE
A Professional Corporation
112 East Pecan Street, Suite 900
San Antonio, Texas 78205-1542
Telephone No. (512) 226-4157
Telecopier No. (512) 226-5154

By: /s/ Moulton S. Dowler, Jr.
Moulton S. Dowler, Jr.
State Bar No. 06083200
ATTORNEYS FOR DEFENDANT

BALL & WEED
Trinity Plaza II, Suite 500
745 East Mulberry
San Antonio, Texas 78212
Telephone No. (512) 731-6300
Telecopier No. (512) 731-6499

By: /s/ William H. Ford
William H. Ford
State Bar No. 07246700

ATTORNEYS FOR PLAINTIFF

CAUSE NO. 17,780

THOMAS M. QUALIA AND JOHN QUALIA	§	IN THE DISTRICT COURT
	§	
VS.	§	63RD JUDICIAL DISTRICT
	§	
ROBERT QUALIA, INDEPENDENT EXECUTOR OF THE ESTATE OF KATHLEEN G. QUALIA, DECEASED AND ROBERT QUALIA, INDIVIDUALLY	§	VAL VERDE COUNTY, TEXAS

ORDER

On the 1st day of February, 1991, came on to be heard Plaintiffs' Motion to Compel Production of Documents in the above captioned case. The Court, after considering the pleadings and argument of counsel, ordered that Defendant take certain acts to produce certain documents on or before March 4, 1991, and Plaintiffs' request for sanctions was carried forward for further consideration at a later date.

On the 12th day of April, 1991, came on to be heard Plaintiffs' Second Motion to Compel Production of Documents, attorneys for Plaintiffs and Defendant having appeared on record, and the Court, having considered the pleadings and arguments of counsel, found Defendant's document production insufficient to meet the Order of the Court entered February 1, 1991;

It is, therefore, ORDERED AND DECREED by the Court that:

1. The claims made by Plaintiffs in their First Amended Original Petition against ROBERT QUALIA, Individually for conversion be and are hereby severed

from those claims made by Plaintiffs against ROBERT QUALIA in his capacity as independent executor of the estate of Kathleen G. Qualia and such severed claims shall hereafter remain in the 63rd Judicial District Court of Val Verde County, Texas under Cause No. 17,780. All claims against ROBERT QUALIA in his capacity as independent executor of the estate of Kathleen G. Qualia shall be dismissed without prejudice for re-filing within the applicable period of time, in the County Court at Law, Val Verde County, Texas;

2. That the answer of Defendant ROBERT QUALIA Individually, to the claims made by Plaintiffs for conversion more fully described in Plaintiffs' First Amended Original Petition filed in Cause No. 17,780 against ROBERT QUALIA, Individually, be and is in all things stricken;

3. That an Interlocutory Default Judgment be entered against ROBERT QUALIA, Individually in the severed case, Cause No. 17,780, on claims of conversion and that damages be awarded to Plaintiffs; the amount of such damages to be determined in a separate proceeding or on a writ of inquiry proceeding for damages; and

4. That Plaintiffs are hereby awarded and shall recover from ROBERT QUALIA, individually attorney's fees in the amount of $5,000.00.

SIGNED this 29th day of August, 1991.

/s/ George M. Thurmond
JUDGE PRESIDING

NO. 880

THOMAS M. QUALIA AND JOHN QUALIA	§	IN THE COUNTY COURT
	§	
	§	
vs.	§	AT LAW OF
	§	
ROBERT QUALIA,	§	
INDEPENDENT EXECUTOR	§	
OF THE ESTATE OF	§	
KATHLEEN G. QUALIA,	§	
DECEASED AND ROBERT	§	VAL VERDE COUNTY,
QUALIA, INDIVIDUALLY	§	TEXAS

FINAL JUDGMENT

On the 22nd day of January, 1993, came on to be heard the Motion for Summary Judgment in this cause by Defendant Robert Qualia, Individually, and as Independent Executor of the Estate of Kathleen G. Qualia, Deceased. All parties appeared by and through their respective attorneys of record and announced ready. The Court, after having examined the pleadings and the summary judgment evidence and hearing the arguments of counsel, is of the opinion that said Motion for Summary Judgment should be granted as hereinafter ordered.

It is accordingly, ORDERED, ADJUDGED AND DECREED that Plaintiffs take nothing against Defendant, and each party shall be responsible for the costs expended by him or them.

SIGNED this 10th day of March, 1993.

/s/ V. Murray Jordan
JUDGE PRESIDING

NO. 880

THOMAS M. QUALIA AND JOHN QUALIA	§	IN THE COUNTY COURT
	§	
vs.	§	AT LAW OF
	§	
ROBERT QUALIA, INDEPENDENT EXECUTOR OF THE ESTATE OF KATHLEEN G. QUALIA, DECEASED AND ROBERT QUALIA, INDIVIDUALLY	§	VAL VERDE COUNTY, TEXAS

MOTION FOR SUMMARY JUDGMENT

TO SAID HONORABLE COURT:

Now comes Robert Qualia, Individually and as Independent Executor of the Estate of Kathleen G. Qualia, Deceased, and moves the Court grant summary judgment that Plaintiffs take nothing by this suit, or that Plaintiffs' suit be abated, and that Defendant recover his costs expended. The specific grounds for such motion are as follows:

1. Based on the pleadings, the certified public records submitted herewith, and the records in this Court and the County Court in Cause No. 3890, In Re: Estate of Kathleen G. Qualia, Deceased, of which records this Court may take judicial notice, true copies of which are attached hereto for the convenience of the Court, there is no genuine issue of material fact and Defendant is entitled to judgment as a matter of law.

2. Defendant is entitled to the abatement of this action on the following grounds:

a. This suit is an impermissible collateral attack on

final orders of the Probate Court of Val Verde County approving the Defendants' inventories and Account For Final Settlement of the Estate of Kathleen G. Qualia, Deceased, and discharging Defendant as the personal representative of said estate.

b. Plaintiffs' claims as set out in Plaintiffs' Original Petition, attack Defendant's final account; allege that Defendant mismanaged the estate by failing to report in said account property consisting of money and livestock claimed to be a part of the estate; and committed various breaches of his fiduciary duties as independent executor of said estate. All of said claims controvert directly the inventories and account approved by the Probate Court and the Court's order discharging Defendant.

c. The Order approving the account recites:

> "...the Court finds that citation has been duly served upon all persons interested in this Estate; that the Court has jurisdiction of the proceedings and of the subject matter as required by law..."

d. No appeal was taken by Plaintiffs with respect to said judgments, except for an Application to Re-Open the estate as described below.

e. On July 18, 1988, Plaintiffs filed in the County Court, sitting in probate, an Application to Re-Open Estate and for Accounting. Such pleading made substantially the same allegations made in the pleading now before the court.

f. On September 6, 1988, Plaintiffs moved to transfer the Application to Re-Open to the statutory Probate Court pursuant to Sec. 5(c) of the Probate Code as a contested matter. This motion was granted by Judge Gonzalez.

g. Thereafter, attorney Carl Pendergrass, on behalf of Defendant, made an appearance in the proceeding to re-open the estate by filing a motion for continuance.

h. On November 28, 1988, Carl Pendergrass was permitted to withdraw as counsel for Defendant.

i. On January 5, 1989, the Application to Re-Open was heard, and on January 8, 1989, the statutory Probate Court by Judge Simmonds conditionally granted the application, but provided in the order that "upon expiration of such sixty-day period, this estate shall be closed without court action."

j. Following such Order, Plaintiff pursued discovery by deposition and examination of documents produced by Defendant.

k. On May 2, 1989, more than 60 days after the order conditionally re-opening the estate, Plaintiffs filed a Motion to Extend Re-Opening of Estate. Although the Court set this Motion for hearing, the Probate Court records fail to reflect any action of the Court on the motion.

l. Plaintiffs took no appeal from the final order of Judge Simmonds granting re-opening for only a limited purpose and providing automatic closing of the estate at the end of 60 days from January 8, 1989.

m. Under the provisions of Sec. 5(e) of the Probate Code, the final orders of the County Court in probate approving the final account and discharging the executor, and of Judge Simmonds in providing for the automatic closing after 60 days, were appealable only to the Court of Appeals.

n. Notwithstanding that Plaintiffs' Motion to extend the time of re-opening the estate was then pending before Judge

Simmonds, Plaintiffs filed an action in the District Court in Cause No. 17,780 on May 24, 1989. Plaintiffs' pleading in the District Court made substantially the same allegations and sought much the same relief as that sought in the Application to Re-Open filed in the Probate Court.

o. Although Defendant has raised objection to the District Court proceedings on jurisdictional grounds, the District Court has rejected such objections in part. On August 29, 1991, the District Court severed and dismissed all of that portion of Plaintiffs' suit against Robert Qualia as Independent Executor of Kathleen G. Qualia, Deceased. The cause of action against Robert Qualia, individually for conversion was retained by the District Court and an interlocutory default judgment was entered as to this claim on the merits.

p. It is Defendant's position that the District Court does not have subject matter jurisdiction of the retained claims against Defendant because those claims relate to matters incident to the Estate of Kathleen G. Qualia over which the Probate Court has jurisdiction; that the suit in the District Court is an improper collateral attack on the orders of the Probate Court related above; and that the District Court's actions are an improper exercise of appellate jurisdiction over the Probate Court contrary to the provisions of Sec. 5 of the Probate Code.

3. Plaintiffs' suit, filed in April, 1992, is barred by limitation under the provision of Section 16.003 and 16.051, Civil Practice and Remedies Code and Sec. 31 of the Probate Code.

a. The basis of Plaintiffs' claims were that Robert Qualia, as Independent Executor, failed to account for money and livestock belonging to the Estate of Kathleen G. Qualia in which they, as devisees under the will, each have a 1/5th interest; that Defendant's actions with respect to such property constituted a breach of his fiduciary duties and were otherwise tortuous [sic] so that Defendant is liable to them for both actual and exemplary damages.

b. The record in the Probate Court reflects that

notice and service was had in the proceedings by posting as required by law; that an inventory of the assets of the Estate was filed September 19, 1985, and approved September 20, 1985; that an amended inventory was filed September 30, 1985, and approved November 6, 1986; that the final account was filed April 13, 1988, and approved April 25, 1988. The Order approving the final account recites due service on interested parties and a finding by the court of subject matter jurisdiction.

c. Plaintiffs' pleading in this suit alleges that the assets they claim entitlement to were not included in either the inventories or in the final account.

d. The inventories and account were filed over 5 years prior to this suit and gave Plaintiffs constructive notice of the position of Defendant that the claimed property was not part of the estate. A constructive notice in law creates an irrebuttable presumption of actual notice. Therefore, the claims of Plaintiffs are barred by limitation as a matter of law.

WHEREFORE, Defendant prays that the Court grant summary judgment that Plaintiffs take nothing by their suit and that Defendant recover his costs.

Respectfully submitted,

GRESHAM, DAVIS, GREGORY,
WORTHY & MOORE
A Professional Corporation
112 E. Pecan Street, Suite 900
San Antonio, Texas 78205
(512) 226-4157 Telephone
(512) 226-5154 Fax

By: /S/ A.W. Worthy
A. W. Worthy

State Bar No.22011000
Moulton S. Dowler, Jr.
State Bar No. 06083200

VERIFICATION

STATE OF TEXAS §
COUNTY OF BEXAR §

BEFORE ME, the undersigned authority personally appeared [sic] A. W. Worthy, known to me to be the person whose name is subscribed hereto, who after being by me duly sworn, on oath stated that he has read the foregoing pleading and that the statements therein contained are true and correct.

/S/ A.W. Worthy
A. W. Worthy

Subscribed and sworn to before me on this 3rd day of August, 1992.

/S/ Barbara L. Urbach
Notary Public in and for
the State of Texas

NOTARY SEAL

NO. 3890

IN RE: THE ESTATE OF	*	IN THE COUNTY COURT
KATHLEEN G. QUALIA,	*	VAL VERDE COUNTY, TEXAS
DECEASED	*	IN PROBATE

ORDER

On this the 5th day of January, 1989, came on to be heard the Motion of Thomas M. Qualia and John Qualia to reopen the above referenced Estate and the Court having considered same is of the opinion and finds that the Estate of Kathleen G. Qualia should be reopened for a period of sixty (60) days from and after the date of the filing of this Order.

It is, therefore, ORDERED, ADJUDGED and DECREED that the Estate of Kathleen G. Qualia be reopened for a period of sixty (60) days from and after the date this Order is filed of record an upon the expiration of such sixty-day period, this Estate shall be closed without further Court action.

It is further ORDERED that during such sixty-day period the Independent Executor, Robert L. Qualia, shall make available to Thomas M. Qualia and John Qualia all books, records and accounts of the Estate including, but not limited to, all checks, deposit slips, bank statements, vouchers for which Estate funds were expended and such other documentation as he may have on hand or subject to his control having to do with the Estate of Kathleen G. Qualia for examination by Petitioners.

It is further ORDERED that the reopening of this Estate is for the limited purpose of allowing Petitioners the opportunity to review the books, records and accounts of the Estate and for no other purpose.

/s/ J.M. Simmonds
JUDGE PRESIDING

[File stamp dated March 8, 1989]

NO. 3890

IN RE: ESTATE OF	§	IN THE COUNTY COURT
	§	
KATHLEEN G. QUALIA,	§	VAL VERDE COUNTY, TEXAS
	§	
DECEASED	§	IN PROBATE

ORDER DISCHARGING PERSONAL
REPRESENTATIVE AND CLOSING ESTATE

ON THIS DAY the Application To Discharge Personal Representative And To Close Estate filed on May 11, 1988, by the Personal Representative of the estate was heard and considered by the Court. The Court has heard the evidence in support of the Application and finds that the estate has been fully administered, that the Account for Final Settlement has been approved previously, that the Personal Representative has delivered all of the estate remaining in his hands to the persons entitled to receive it, and that the estate should be closed.

IT IS, THEREFORE, ORDERED that ROBERT L. QUALIA, Independent Executor of this estate, be discharge from his trust and that this estate be declared closed.

SIGNED this 12 day of May, 1988.

/s/ Sergio Gonzalez, Jr.
JUDGE PRESIDING

NO. 880

THOMAS M. QUALIA and JOHN QUALIA	}{	IN THE COUNTY COURT
VS.	}{	AT LAW OF
ROBERT QUALIA, INDEPENDENT EXECUTOR OF THE ESTATE OF KATHLEEN G. QUALIA, DECEASED AND ROBERT QUALIA, INDIVIDUALLY	}{	VAL VERDE COUNTY, TEXAS

PLAINTIFFS' FIRST AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, THOMAS M. QUALIA AND JOHN QUALIA, hereinafter called Plaintiffs, complaining of ROBERT QUALIA, INDEPENDENT EXECUTOR OF THE ESTATE OF KATHLEEN G. QUALIA, DECEASED, AND ROBERT QUALIA, INDIVIDUALLY, hereinafter known as Defendant, and in support thereof respectfully show unto the Court the following:

I.

Plaintiffs, THOMAS M. QUALIA AND JOHN QUALIA, are residents of Del Rio, Val Verde County, Texas. Defendant, ROBERT QUALIA, INDEPENDENT EXECUTOR OF THE ESTATE OF KATHLEEN G. QUALIA, DECEASED AND ROBERT QUALIA, INDIVIDUALLY, is a resident of Del Rio, Val Verde County, Texas, and may be served with Citation at 137 Hudson Drive, Del Rio, Val Verde County, Texas.

II.

Plaintiffs and Defendant are individuals interested in the Estate of Kathleen G. Qualia, Deceased, on which an independent administration was opened on February 6, 1985, in the County Court of Val Verde County, Texas. Defendant is the independent executor of this estate.

III.

At least fifteen (15) months have expired since the date on which the independent administration was created and the order appointing Defendant independent executor was entered.

IV.

On May 10, 1988, Plaintiffs posted a letter to the attorney for the estate, Carol Pendergrass, Esq., demanding a detailed and final accounting of the probate estate of their mother, Kathleen G. Qualia. True and correct copies of such letter are attached hereto marked Exhibit "A" and incorporated herein for all purposes. Additionally, oral requests were made by Plaintiffs of the estate attorney, Carl Pendergrass, Esq., that the estate not be finalized until such time as Plaintiffs were able to fully examine the books, records and accounts of the estate. Up to the time of the filing of this petition, Defendant has wholly failed to respond and/or provide the requested accounting.

V.

On or about April 12, 1988, unbeknownst to Plaintiffs, Defendant filed with the County Clerk of Val Verde County his Account for Final Settlement of the Estate. Such Account for Final Settlement requested that citation be given as directed by the Court by written order and that upon being satisfied that citation had been duly served upon all persons interested in the estate that the Court examine the Account for Final Settlement and the vouchers accompanying same and after hearing all exceptions or objections to the account and

evidence in support of or against, audit and settle the estate.

Plaintiffs would show that there was no written order directed by the Court regarding citation; that there was no service of citation upon all persons interested in the estate to-wit: the heirs and beneficiaries which include the Plaintiffs; and that there were no vouchers or other documentation accompanying the Account for Final Settlement. Since Plaintiffs were unaware of the Account for Final Settlement, they did not have an opportunity to review such account and question it or to audit the estate.

Defendant's final accounting of the estate is wholly lacking in documentation or explanation or such other facts or documentation as are necessary to a full and definite understanding of the exact condition of the estate, the manner in which it was handled and the transactions which took place in the estate while the Defendant had the estate under his sole control.

VI.

Further, Plaintiffs have reason to believe that Defendant has mis-managed the assets and property of the estate, has engaged in business transactions with the assets of the estate that represent a conflict of interest in his capacity as independent executor, in view of acts he has taken in his individual capacity, which are depriving the estate and its ultimate beneficiaries of their rightful interests.

Plaintiffs have obtained the Last Will and Testament of the husband of the Decedent, Luis F. Qualia, which Last Will and Testament was prepared and filed of record in the Country of Mexico. A copy of said will and translation of said will are attached, marked as Exhibit "B" and "C", respectively, and incorporated herein for all purposes. Plaintiffs have further obtained a translation of such Last Will and Testament which Will and translation clearly evidence that at the death of Luis F. Qualia, the Decedent, Kathleen G. Qualia was seized and possessed of assets in the Country of Mexico which assets, to the knowledge and belief of Plaintiffs, still exist and are part of the

estate of Kathleen G. Qualia. The referenced assets were not reported by the executor of the estate of Kathleen G. Qualia in either the Inventory and Appraisement or the First Amended Inventory and Appraisement prepared and filed in this cause to which reference is hereby made. The exact nature and extent of these assets is unknown at this time to Plaintiffs, however, Plaintiffs aver that such assets consist of money realized from the sale of livestock and an interest in livestock itself. Plaintiffs further would show to the Court that the livestock operation in Mexico is an ongoing operation and, therefore, the interest of the estate of the Decedent presently exists.

VII.

Defendant has proceeded to undertake and perform certain acts and transactions to his sole benefit and to the detriment of Plaintiffs. In addition to the previously recited acts, Plaintiffs contend that Defendant has intermingled the funds and assets belonging solely to the estate of Kathleen G. Qualia into his own accounts, and has failed to account to the estate or Plaintiffs herein for his actions.

VIII.

Further, Plaintiffs will show that as independent executor of the estate of Kathleen G. Qualia, Defendant was charged with certain duties, including the management and distribution of the estate assets to the rightful beneficiaries. Plaintiffs will show that Defendant transferred assets to himself and retained assets in contravention of the Last Will and Testament of Kathleen G. Qualia, and has failed and refused to distribute to Plaintiffs, as beneficiaries, their share of the estate in accordance with the terms of said will. Defendant's acquisition and retention of the estate assets, specifically, those described in Exhibits "D" and "E" attached hereto and incorporated herein for all purposes, and his failure to account to Plaintiffs for their share of said assets is a breach of the confidential relationship between the parties and justifies the imposition of a constructive trust. The Plaintiffs will show that unless a constructive trust is imposed upon the property as requested in this pleading, Defendant will be unjustly

enriched at Plaintiffs' expense.

IX.

The aforesaid acts constitute a breach of Defendant's fiduciary and contractual obligations proximately causing damages to the estate of Kathleen G. Qualia and/or Plaintiffs herein.

X.

Plaintiffs would show that Defendant was negligent in the performance of his fiduciary duties as independent executor of the estate of Kathleen G. Qualia and that said negligent performance of his duties, power and obligations were a proximate cause of damages to Plaintiffs herein.

XI.

Plaintiffs would further show that they have only recently discovered the breach of fiduciary duty committed by Defendants herein and would further show that Plaintiff has been unable to discover Defendants' breach, in spite of the exercise of reasonable and due diligence by Plaintiffs herein. The inability to discover Defendants' breach is a direct result of the intentional and purposeful acts of concealment and misrepresentation committed by Defendants herein.

XII.

Plaintiffs would show that Defendant willfully, wantonly, and intentionally performed acts and transactions under the power of his position as independent executor, said acts and transactions resulting solely to his benefit and to the detriment of Plaintiffs.

XIII.

The aforesaid acts constitute a tortuous interference with the inheritance rights of Plaintiffs for which Plaintiffs are entitled to actual

and exemplary damages.

XIV.

As a proximate result of the Defendant's conduct and actions, Plaintiffs have incurred actual damages in excess of the minimum jurisdiction of this Court.

XV.

Additionally, Plaintiffs would show that the wrongs done by the Defendant were aggravated by the willfulness, wantonness and malice for which the law allows the imposition of exemplary damages. The Defendant acted with an evil intent to harm Plaintiffs and benefit himself. His conduct was intentional, willful and wanton and without justification or excuse, and he acted with gross Indifference to the rights of the Plaintiffs herein. Plaintiffs, therefore, seek exemplary damages in a sum within the jurisdictional limit of this Court.

XVI.

Plaintiffs would show that as a result of the aforementioned acts and/or causes of action by Defendant, it has become necessary to engage the services of the undersigned attorneys and that Plaintiffs are entitled to attorneys' fees incurred in the prosecution of their causes of action for the wrongs and breaches and the willful and wanton wrongful acts by Defendant.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that Defendant be cited to appear and answer herein, and that on final hearing, Plaintiffs have judgment as follows:

1. An accounting of all the assets of and affairs of the Estate of Kathleen G. Qualia and amounts owed to Plaintiffs;

2. Decreeing that Plaintiffs recover actual damages in

excess of the minimum jurisdiction of this Court;

3. Decreeing a constructive trust on the property described in Exhibit "A", attached to this petition and incorporated herein for all purposes, with Defendant as constructive trustee for the benefit of Plaintiffs;

4. Ordering Defendant, as constructive trustee, to convey to Plaintiffs their interests held by Defendant in the property described in this petition;

5. Awarding costs of suit herein incurred by Plaintiffs;

6. Exemplary damages in the sum within the jurisdictional limits of this Court;

7. Interest at the highest legal rate from February 6, 1985, until judgment;

8. Interest after Judgment at the rate of nine percent (9%) per annum until paid; and

9. Reasonable attorneys' fees and such other and further relief, at law or in equity, as to which Plaintiffs may be by this pleading, proper amendment thereto, show themselves justly entitled.

Respectfully submitted,

BALL & WEED
A Professional Corproatoin
Trinity Plaza II, Suite 500
745 East Mulberry
San Antonio, Texas 78212
(512) 731-6300
Telecopier: (512) 731-6499

By: /s/ William H. Ford
WILLIAM H. FORD
State Bar No. 07246700

ATTORNEYS FOR PLAINTIFFS,
THOMAS M. QUALIA AND
JOHN QUALIA

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading has been sent by certified mail, return receipt requested, to Moulton S. Dowler, Jr., Gresham, Davis, Gregory, Worthy & Moore, P.C., 112 E. Pecan, 900 NBC Bank Plaza, San Antonio, Texas 78205, on this 25th day of August, 1992.

/s/ William H. Ford
WILLIAM H. FORD

NO. 17,780

THOMAS M. QUALIA AND JOHN QUALIA	§	IN THE DISTRICT COURT
	§	
V.	§	63RD JUDICIAL DISTRICT
	§	
ROBERT QUALIA, INDEPENDENT EXECUTOR OF THE ESTATE OF KATHLEEN G. QUALIA, DECEASED AND ROBERT	§	

PLAINTIFFS' FIRST AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, THOMAS M. QUALIA AND JOHN QUALIA, hereinafter called Plaintiffs, complaining of ROBERT QUALIA, INDEPENDENT EXECUTOR OF THE ESTATE OF KATHLEEN G. QUALIA, DECEASED AND ROBERT QUALIA, INDIVIDUALLY, hereinafter known as Defendant, and in support thereof respectfully shows unto the Court the following:

I.

Plaintiffs, THOMAS M. QUALIA AND JOHN QUALIA, are residents of Del Rio, Val Verde County, Texas. Defendant, ROBERT QUALIA, INDEPENDENT EXECUTOR OF THE ESTATE OF KATHLEEN G. QUALIA, DECEASED AND ROBERT QUALIA, INDIVIDUALLY has been served and has filed an answer in this cause.

II.

Plaintiffs and Defendant are individuals interested in the Estate of Kathleen G. Qualia, Deceased, on which an independent administration was opened on February 6, 1985 in the County Court of

Val Verde County, Texas. Defendant is the independent executor of this estate.

III.

At least fifteen (15) months have expired since the date on which the independent administration was created and the order appointing Defendant independent executor was entered.

IV.

On May 10, 1988, Plaintiffs posted a letter to the attorney for the estate, Carl Pendergrass, Esq., demanding a detailed and final accounting of the probate estate of their mother, Kathleen G. Qualia. True and correct copies of such letter are attached hereto marked Exhibit "A" and incorporated herein for all purposes. Additionally, oral requests were made by Plaintiffs of the estate attorney, Carl Pendergrass, Esq. that the estate not be finalized until such time as Plaintiffs were able to fully examine the books, records and accounts of the estate. Up to the time of the filing of this petition Defendant has wholly failed to respond and/or provide the requested accounting.

V.

On or about April 12, 1988, unbeknownst to Plaintiffs, Defendant filed with the County Clerk of Val Verde County his Account for Final Settlement of the Estate. Such Account for Final Settlement requested that citation be given as directed by the Court by written order and that upon being satisfied that citation had been duly served upon all persons interested in the estate that the Court examine the Account for Final Settlement and the vouchers accompanying same and after hearing all exceptions or objections to the account and evidence in support of or against, audit and settle the estate.

Plaintiffs would show that there was no written order directed by the Court regarding citation; that there was no service of citation upon all persons interested in the estate to-wit: the heirs and

beneficiaries which include the Plaintiffs; and that there were no vouchers or other documentation accompanying the Account for Final Settlement. Since Plaintiffs were unaware of the Account for Final Settlement, they did not have an opportunity to review such account and question it or to audit the estate.

Defendant's final accounting of the estate is wholly lacking in documentation or explanation or such other facts or documentation as are necessary to a full and definite understanding of the exact condition of the estate, the manner in which it was handled and the transactions which took place in the estate while the Defendant had the estate under his sole control.

VI.

Further, Plaintiffs have reason to believe that Defendant has mismanaged the assets and property of the estate, has engaged in business transactions with the assets of the estate that represent a conflict of interest in his capacity as independent executor, in view of acts he has taken in his individual capacity, which are depriving the estate and its ultimate beneficiaries of their rightful interests.

Plaintiffs have obtained the Last Will and Testament of the husband of the Decedent, Luis F. Qualia, which Last Will and Testament was prepared and filed of record in the Country of Mexico. A copy of said will and translation of said will are attached, marked as Exhibit "B" and "C", respectively and incorporated herein for all purposes. Plaintiffs have further obtained a translation of such Last Will and Testament which Will and translation clearly evidence that at the death of Luis F. Qualia, the Decedent, Kathleen G. Qualia was seized and possessed of assets in the Country of Mexico which assets, to the knowledge and belief of Plaintiffs, still exist and are part of the estate of Kathleen G. Qualia. The referenced assets were not reported by the executor of the estate of Kathleen G. Qualia in either the Inventory and Appraisement or the First Amended Inventory and Appraisement prepared and filed in this cause to which reference is hereby made. The exact nature and extent of these assets is unknown

at this time to Plaintiffs, however Plaintiffs aver that such assets consist of money realized from the sale of livestock and an interest in livestock itself. Plaintiffs further would show to the Court that the livestock operation in Mexico is an ongoing operation and therefore the interest of the estate of the Decedent presently exists.

VII.

Defendant has proceeded to undertake and perform certain acts and transactions to his sole benefit and to the detriment of Plaintiffs. In addition to the previously recited acts, Plaintiffs contend that Defendant has intermingled the funds and assets belonging solely to the estate of Kathleen G. Qualia into his own accounts, and has failed to account to the estate or Plaintiffs herein for his actions.

VIII.

Further, Plaintiffs will show that as independent executor of the estate of Kathleen G. Qualia, Defendant was charged with certain duties, including the management and distribution of the estate assets to the rightful beneficiaries. Plaintiffs will show that Defendant transferred assets to himself and retained assets in contravention of the Last Will and Testament of Kathleen G. Qualia, and has failed and refused to distribute to Plaintiffs, as beneficiaries, their share of the estate in accordance with the terms of said will. Defendant's acquisition and retention of the estate assets, specifically, those described in Exhibits "D" and "E" attached hereto and incorporated herein for all purposes, and his failure to account to Plaintiffs for their share of said assets is a breach of the confidential relationship between the parties and justifies the imposition of a constructive trust. The Plaintiffs will show that unless a constructive trust is imposed upon the property as requested in this pleading, defendant will be unjustly enriched at Plaintiffs' expense.

IX.

The aforesaid acts constitute a breach of Defendant's fiduciary

and contractual obligations proximately causing damages to the estate of Kathleen G. Qualia and/or Plaintiffs herein.

X.

Plaintiffs would show that Defendant was negligent in the performance of his fiduciary duties as independent executor of the estate of Kathleen G. Qualia and that said negligent performance of his duties, powers and obligations were a proximate cause of damages to Plaintiffs herein.

XI.

Plaintiffs would show that Defendant willfully, wantonly, and intentionally performed acts and transactions under the power of his position as independent executor, said acts and transactions resulting solely to his benefit and to the detriment of Plaintiffs.

XII.

The aforesaid acts constitute a tortuous interference with the inheritance rights of Plaintiffs for which Plaintiffs are entitled to actual and exemplary damages.

XIII.

The aforesaid acts constitute a conversion of assets in which Plaintiffs have a beneficial interest, to Defendant's own use and benefit, and for which the law permits recovery of actual and exemplary damages.

XIV.

As a proximate result of the Defendant's conduct and actions, Plaintiffs have incurred actual damages in excess of the minimum jurisdiction of this Court.

XV.

Additionally, Plaintiffs would show that the wrongs done by the Defendant were aggravated by the willfulness, wantonness and malice for which the law allows the imposition of exemplary damages. The Defendant acted with an evil intent to harm Plaintiffs and benefit himself. His conduct was intentional, willful and wanton and without justification or excuse, and he acted with gross Indifference to the rights of the Plaintiffs herein. Plaintiffs, therefore, seek exemplary damages in the sum of $200,000.00.

XVI.

Plaintiffs would show that as a result of the aforementioned acts and/or causes of action by Defendant, it has become necessary to engage the services of the undersigned attorneys and that Plaintiffs are entitled to attorneys fees incurred in the prosecution of their causes of action for the wrongs and breaches and the willful and wanton wrongful acts by Defendant.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that Defendant be cited to appear and answer herein, and that on final hearing, Plaintiffs have judgment as follows:

10. An accounting of all the assets of and affairs of the Estate of Kathleen G. Qualia and amounts owed to Plaintiffs;

11. Decreeing that Plaintiffs recover actual damages in excess of the minimum jurisdiction of the Court;

12. Decreeing a constructive trust on the property described in Exhibit "A", attached to this petition and incorporated herein for all purposes, with Defendant as constructive trustee for the benefit of Plaintiffs;

13. Ordering Defendant, as constructive trustee, to convey

to Plaintiffs their interests held by Defendant in the property described in this petition;

14. Awarding costs of suit herein incurred by Plaintiffs;

15. Exemplary damages in the sum of $200,000.00;

16. Interest at the highest legal rate from February 6, 1985 until judgment;

17. Interest after Judgment at the rate of nine percent (9%) per annum until paid; and

18. Reasonable attorney's fees and such other and further relief, at law or in equity, as to which Plaintiffs may by this pleading, proper amendment thereto, show themselves justly entitled.

Respectfully submitted,

GROCE, LOCKE & HEBDON
A Professional Corproatoin
2000 Frost Bank Tower
San Antonio, Texas 78205
(512) 225-3031
FAX: (512) 231-6699

By: /s/ William H. Ford
WILLIAM H. FORD
State Bar No. 07246700
DEBORAH D. DIFILIPPO
State Bar No. 05478600

ATTORNEYS FOR
DEFENDANT, THOMAS M.
QUALIA AND JOHN QUALIA

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading has been sent by certified mail, return receipt requested, to Haygood Gulley, P.O. Box 420248, Del Rio, Texas 78842-0248, on this 27th day of July, 1990.

/s/ William H. Ford
WILLIAM H. FORD

STAGES IN THE PROCEEDINGS WHEN THE DUE PROCESS ARGUMENT WAS RAISED

1. <u>In the trial court, pre-trial:</u>

February 24, 1992 — *Motion of Robert Qualia, Defendant, for Reconsideration of Order Dated August 29, 1991 Striking Defendant's Pleadings and Granting Default Judgment* and supporting *Memorandum of Authorities*[1]

"The Order entered serves to adjudicate Defendant's defenses without consideration of the merits of such defenses and, as such, does not afford Defendant constitutional due process of law ... Plaintiffs' claim on the merits is barred by the final orders of the Val Verde County Probate Court ..."
(Motion at 1,2.)

Motion denied, after hearing,[2] by Order dated May 13, 1992. (App. at 67a; Ct. R. 171-72.)

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[1]These pleadings were inexplicably not found in the court records, but have been added by a stipulation of the parties that is being filed with the Fourth Court of Appeals.

[2]At the hearing, even as Judge Thurmond reconsidered -- and upheld -- the sanctions order, he strongly intimated that he disagreed with it:

> ...I'm not a lawyer in the case, but if I was taking up that discovery, that sanctions order, the first thing I would say is, [I] had no jurisdiction on that order. I sure would. Then if they – if you get over that hurdle then you can talk about the Trans-America [sic] case. That really concerns me more than the other.

(Hearing of April 20, 1992, at 9:7-13.)

2. In the state appellate court, mandamus proceeding:[3]

May 21, 1992 *Petition for Writ of Mandamus*

"There is in this case no basis for any claim that Relator's failure to produce the factura books or the inventory of livestock constituted such a 'hindrance of the discovery process' as to justify a presumption that [Robert's] claims or defenses lack merit as is required by [the Texas Supreme Court in Transamerican]."[4]
(Petition at 9.)

"The effect of the order is to deprive [Robert] of defenses which have nothing to do with the factura books and inventory: the lack of jurisdiction of the trial court under the authorities discussed [elsewhere in the Petition] and the impropriety of the collateral attack which this district court proceeding makes on the orders of the probate court."
(Petition at 10.)

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[3]Qualia v. Thurmond, No. 04-92-272-CV, in the Court of Appeals for the Fourth Court of Appeals District of Texas.

[4]In Transamerican Natural Gas Corp. v. Powell, 811 S.W.2d 913 (Tex. 1991), the trial court's default judgment, imposed as a discovery sanction, was reversed as unjust, taking into account the line of United States Supreme Court decisions beginning with Hovey v. Elliott, 167 U.S. 409 (1897).

July 8, 1992 *Opinion*, denying writ of mandamus (App. at 59a-66a)

"[The appellate court agrees with Thomas and John's contention] that the order striking Robert's pleadings fully comports with the standards set out in Transamerican."
(Opinion at 2.)

"Robert also claims that the trial court's order deprives him of defenses which have nothing to do with the production of the factura books, bank records, tax returns, or the livestock inventories. His defenses would have included the allegation that the probate court in Val Verde County had jurisdiction over the dispute because it was a matter incident to an estate, and the district court proceeding was an impermissible collateral attack on the final judgment of the probate court. ... From the evidence before him, the judge concluded that Robert had the ability to produce the materials but was unwilling to do so. The documents went to the very heart of the conversion claim, and the court's striking of the general denial was not excessive under the circumstances. ... As to Robert's request that we require Judge Thurmond to dismiss the underlying cause, we hold that subject-matter jurisdiction cannot be determined in a mandamus proceeding."
[Opinion at 8, 9 (emphasis added).]

3. In the trial court, pre-trial:

July 31, 1992 — *Motion for Leave to File Amended Pleadings*[5] (Ct. R. 180-83)

"If, indeed, this Court does not have jurisdiction over this cause, or if the several grounds set out as pleas in abatement should be rejected, then substantial due process issues are involved in Defendant's request for rulings and request for relief prayed for."
[Motion at 3 (amended answer raises affirmative defenses of collateral attack and limitations).]

October 2, 1996 — *Motion for Leave to File Defendant's First Amended Answer, for Reconsideration of Order Striking Defendant's Answer, and for Reconsideration of Denial of Defendant's [Second] Motion for Summary Judgment, and Memorandum of Authorities in Support Thereof* (Ct. R. 527-39)

"To the extent such sanction was properly imposed upon the presumption that Defendant's defense to Plaintiffs' conversion claims is without merit, such presumption does not and should not extend to Defendant's affirmative defenses of collateral estoppel, res judicata, and limitations, and to deny Defendant the right to

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[5]This motion and an amended answer were filed by Robert, but the motion was never acted on by the Court. In 1993, summary judgment as to all of Thomas and John's claims was granted in Robert's favor on jurisdictional grounds, but that judgment was overturned by the Fourth Court of Appeals. Qualia v. Qualia, 878 S.W.2d 339 (Tex. App.–San Antonio 1994, writ denied). The appellate court did not address the affirmative defenses that were urged as alternative bases for summary judgment below. Id. at 341. At this point, those affirmative defenses included res judicata, which had become available as a result of the unappealed final judgment entered by the County Court at Law on March 10, 1993. (See App. at 71a-77a.)

assert such affirmative defenses would constitute a denial of Defendant's right to due process ..."
(Motion at 5.)

"... [T]o prohibit this Defendant from raising affirmative defenses does not flow logically from any presumption that his defense to the Plaintiffs' conversion claim is without merit, since affirmative defenses are in the nature of confession and avoidance, rather than defenses on the merits." (Motion at 9.)

Motion denied by Order dated October 16, 1996. (App. at 52a-53a; Ct. R. 554-56.)

January 6, 1997 — *Motion for Reconsideration of Order of October 16, 1996* (Ct. R. 575-622)

January 21, 1997 — *Hearing* on Motion for Reconsideration of Order of October 16, 1996

"[ROBERT'S COUNSEL]: ... And [the request to file affirmative defenses] is where we get down to the due process issue. What [Judge Thurmond] struck was a discovery sanction that related to the merits of the case. And the law on death penalty sanctions is that before that can be done, the conduct has to be so wrongful that there is a presumption that the party's defense or cause of action, as the case may be, was without merit."
(Hearing of January 21, 1997, at 16:12-19.)

"[ROBERT'S COUNSEL]: ... [Res judicata, collateral estoppel and limitations do not] have anything to do with the books and

records for which Judge Thurmond imposed the discovery sanctions."
(Hearing of January 21, 1997, at 17:15-17.)

"THE COURT: ... And [counsel for plaintiffs], I'd like you to address the defense's contention that they [sic] went too far in not allowing them to answer as to collateral estoppel and res judicata, since that has nothing to do with what the information you were trying to get from whatever documents that [Robert] the executor did not give you."
(Hearing of January 21, 1997, at 44:17-23.)

January 24, 1997 *Hearing* on Motion (continued)

"[ROBERT'S COUNSEL:] ... In other words, well, if you've got a good defense, show me. If you won't show me, we can presume that you didn't have one so we didn't deprive you of due process because you didn't have a valid claim anyway.

"That does not run to something that's unrelated to the conduct. The conduct here has to do with these factura books. Everything he talked about went to the merits of his claim and our defense. These independent matters over here – and the Supreme Court calls them, in effect, freestanding matters. They're in the nature of confession and avoidance: Well, okay, if we did it, so what? You didn't bring your suit timely. If we did it, so what? It's already been decided, and we have collateral estoppel or res judicata.

"Nothing that he's talked about of what [Robert] did or didn't do in any way relates to

those issues. They are matters of law, can be decided by the Court on summary judgment. We go to trial. They're going to be issues of law for the Court and not for the jury. Has nothing to do with his merits claim. ...

"In other words, I'll concede – for argument, let's concede that it related to the merits and the presumption arose as to the merits. No way can it arise as to uncontested factual matters which are matters of law for the Court. ..."

(Hearing of January 24, 1997, at 50:11 through 51:15.)

"THE COURT: ... [B]ut it still seems to me that the remedy that [Thomas and John] obtained, the sanctions, to the point where [Robert] can't defend the liability, that gives you what you were trying to get out of [the discovery sought]. And then you've gone further and taken away their legal defenses of collateral estoppel and limitations. It seems to be excessive, and I'm not comfortable with it. ...

* * * * *

"THE COURT: ...[Y]ou wanted the books so you could prove liability. Well, in essence [Judge Thurmond] gave you the liability. And looks like he's gone further. He didn't go further because at the time, that was all that was before him. ... But now we do have these pleas in bar, at bar, whatever it's called, and by including those, I think we've gone too far."

(Hearing of January 24, 1997, at 54:6-13, and 55:4-11.)

"THE COURT: I'm going to allow the affirmative defenses. That's it."
(Hearing of January 24, 1997, at 63:5-6.)

Motion granted by Order dated January 24, 1997. (App. at 50a-51a; Ct. R. 666-67.)

"... Defendant may file an Amended Answer raising the affirmative defenses of res judicia [sic], collateral estoppel and limitations ... [T]he filing of the Amended Answer permitted herein does not set aside the default judgment granted against Defendant pursuant to the Order signed by the Honorable George M. Thurmond on August 29, 1991."
(Order of January 24, 1997.)

4. <u>In the trial court, post-trial:</u>

March 13, 1997 *Hearing* on Motions

"THE COURT: The reason that I want to reconsider or take another look at the sanctions is I think I'm right. I'm 99 percent sure I'm right, but if I'm wrong, the Fourth Court [of Appeals] can't correct it because there's no right of appeal. Whereas if I reinstate the sanctions and I am wrong, the Fourth Court will reverse and take care of that matter.

"That's the only reason that I will do it because I think I'm right. I think [the sanctions] go too far. And if I do reinstate sanctions, it's just because – not that I think I ruled wrong, but to give the plaintiffs a chance to have a Fourth Court ruling. ..."
(Hearing of March 13, 1997, at 3:13-24.)

April 1, 1997 — *Order*, granting Motion to Reinstate Sanctions (App. at 46a-47a; Ct. R. 748-49)

"It is therefore ordered that the sanctions imposed in the August 29, 1991 Order shall apply to Robert Qualia, individually. It is further ordered that the Amended Answer filed by Defendant Robert Qualia January 27, 1997, and all previous answers filed by Defendant Robert Qualia, individually, be stricken in their entirety. It is further ordered that the Interlocutory Default Judgment on claims of conversion and the award of attorneys' fees as set forth in the Order of August 29, 1991 entered against Defendant Robert Qualia, individually, remain in full force and effect." (Order of April 1, 1997.)

July 15, 1997 — *Defendant's Objections to Plaintiffs' Motion for Judgment* (Ct. R. 755-60)

"... there was no connection between the death penalty sanctions and the defenses asserted by Defendant relating to collateral estoppel, res judicata, and the bar of the statute of limitations ..."
(Objections at 4, 5.)

"Defendant objects to said Motion for Judgment on the ground that following the trial, Judge Eschenberg, without notice and hearing and an opportunity to Defendant to present evidence, again granted sanctions prohibiting Defendant from raising his defenses, thereby violating the standards for the imposition of death penalty sanctions imposed by the Supreme Court and

depriving Defendant of due process of law ..." (Objections at 5.)

July 23, 1997 — *Defendant's Brief in Support of Objections to Plaintiffs' Motion for Judgment and in Opposition to Imposition of Death Penalty Sanctions*[6]

"The record in this case is clear ... None of the materials claimed by Plaintiffs to have been improperly withheld were in any way relevant to [the affirmative] defenses. ... The failure to produce the documents involved had nothing to do with whether Plaintiffs were barred from pursuing their claims as a matter of law." (Brief at 11, 12.)

July 28, 1997 — *Letter Ruling*, granting Defendant's Motion for Judgment N.O.V. as to all claims but conversion and granting judgment for Plaintiffs on conversion (App. at 44a-45a)

August 13, 1997 — *Letter Ruling*, re-confirming that causes of action are barred by res judicata and limitations (App. at 42a-43a)

August 20, 1997 — *Judgment* (App. at 35a-41a; Ct. R. 767-73)

September 19, 1997 — *Motion for New Trial* (Ct. R. 775-83)

"The Court erred in overruling Defendant's objections to the Judgment on the ground that the conduct for which 'death penalty' sanctions were imposed by the Court in 1991 had no

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[6]This pleading was inexplicably not found in the court records, but has been added by a stipulation of the parties that is being filed with the Fourth Court of Appeals.

relevance to the meritorious affirmative defenses asserted by Robert Qualia at trial. Thus, no presumption as to the lack of merit of those claims arose, and the denial to Robert Qualia of the right to assert those defenses constitutes a denial of due process."
(Motion at 4.)

5. **In the state appellate court:**[7]

March 6, 1998 — *Brief for Appellant*, briefing, inter alia, the following "Issues":

- "Whether the striking (or refusal to consider) Appellant's affirmative defenses as a sanction for refusal to produce certain books and records in discovery, which books and records did not relate to the substance of Appellant's affirmative defenses, was violative of Appellant's right not to be deprived of property except by due process of law ..."[8]

- "Whether Appellant was entitled to a directed verdict on limitations or judgment n.o.v. in his favor on the affirmative defenses of res judicata, collateral estoppel, limitations, and improper collateral attack on the probate order of the County Court, had been established as a matter of law."

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[7]Qualia v. Qualia, No. 04-97-933-CV, in the Court of Appeals for the Fourth Court of Appeals District of Texas.

[8]This Issue was also the subject of a Reply by Robert.

- "Whether the Opinion of this Court denying Appellant mandamus relief with respect to the August, 1991, Order striking his general denial is 'law of the case' with respect to the issue of the propriety of striking (or of not considering) Appellant's affirmative defenses which were raised subsequent to the denial of mandamus relief."

- "Whether the Court, in October, 1996, by striking Appellant's affirmative defenses as a discovery sanction, deprived Appellant of his right not to be deprived of property except by due process of law by striking said defenses without affording Defendant a hearing as to the propriety of striking affirmative defenses which were unrelated to the discovery issue giving rise to the sanction."

August 5, 1998 — *Opinion* and *Judgment* of the Fourth Court of Appeals (App. at 10a-34a)

"Robert argues that the district court's striking of his amended answers raising affirmative defenses, which were filed after entry of the default judgment, violated his constitutional rights. Robert contends that although default judgment was entered on the conversion claim, such a discovery sanction did not prevent him from subsequently raising affirmative defenses to the claim, and the district court was required to consider such affirmative defenses. ...

"If a party's answer is stricken as a discovery sanction, a default judgment entered thereafter is postured as a no-answer default

judgment. Once a default judgment is taken, all allegations of fact set out in the plaintiff's petition are deemed admitted except for the amount of unliquidated damages.

"... Robert's liability on the conversion claim was prescribed by the striking of his answer to that claim and entry of default judgment against him. Therefore, the entry of default judgment against Robert in his individual capacity on the conversion claim was a final disposition of that claim, leaving only the issue of damages to be litigated and precluding the filing of any further pleadings or answers raising affirmative defenses. The entry of default judgment also precluded the district court from later entering a j.n.o.v. on the conversion claim. The district court struck from the record only those answers and amended answers related to the conversion claim against Robert in his individual capacity that were filed by Robert after entry of the default judgment." [Opinion at 15-16 (citations omitted).]

August 20, 1998 — *Appellant's Motion for Rehearing and Rehearing En Banc*, briefing, inter alia, the following "Points of Error":

- "The court erred in denying the point of error of Robert Qualia that the trial court denied him a trial of his affirmative defenses thereby depriving him of his property without due process of law."

- "This court erred in holding that the interlocutory order entered by Judge Thurmond striking Robert's general denial was enforceable as a final judgment granting a default."

Motion for Rehearing and Motion for Rehearing En Banc denied by Letter Rulings dated September 16, 1988. (App. at 6a-9a.)

6. In the Supreme Court of Texas:[9]

December 15, 1998 — *Petition for Review* in the Supreme Court of Texas, briefing, inter alia, the following "Issues Presented":

- "The Court of Appeals erred in affirming the trial court's striking of Robert's affirmative defenses totally unrelated to the information or documents sought in the discovery. Such action constitutes a denial of due process unless the defenses were related to the matter sought in discovery."

- "Robert's affirmative defenses were established as a matter of law and the trial court erroneously denied Robert's motion for judgment notwithstanding the verdict concerning the conversion claim."

Petition for Review by Texas Supreme Court denied on February 18, 1999. (App. at 3a.)

March 15, 1999 — *Motion for Rehearing of Robert Louis Qualia's Petition for Review*, briefing, inter alia, the following "Issues Presented":

- "This Court should grant Robert Qualia's Motion for Rehearing and resolve this important

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[9]Qualia v. Qualia, No. 98-1041, in the Supreme Court of Texas.

constitutional question of first impression in Texas concerning the striking of affirmative defenses as a discovery sanction when the affirmative defenses are totally unrelated to the information or documents sought in discovery."

- "This Court should grant Robert Qualia's Motion for Rehearing because the Court of Appeals erred in affirming the District Court's striking of Robert Qualia's affirmative defenses as a discovery sanction for refusal to participate in or for hindrance of discovery when the affirmative defenses are totally unrelated to the information or documents sought in the discovery. Such action constitutes a denial of due process unless the defenses were related to the matter sought in discovery."

- "Robert Qualia's affirmative defenses were established as a matter of law and the trial court erroneously denied Robert's motion for judgment notwithstanding the verdict concerning the conversion claim."

March 30, 1999 — *Motion to Publish Court of Appeals Opinion*[10] *Relevant to Pending Motion for Rehearing of Petition for Review*, requesting publication of a state appellate opinion that "addresses, among other things, whether a trial court abuses its discretion when it strikes a party's affirmative defenses for conduct during discovery (i.e., discovery abuse that has no direct link to the merits of the affirmative defenses)." (Motion at 2.)

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[10] In re: Fina Oil and Chemical Co., No. 13-98-640-CV (Tex. App.–Corpus Christi March 11, 1999, orig. proceeding) (not designated for publication).

Motion for Rehearing Petition for Review and overruling Motion to Publish overruled by Supreme Court of Texas on April 15, 1999. (App. at 1a-2a.)